

**Before the
Federal Communications Commission
WASHINGTON, DC 20554**

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In the Matter of)	
)	
Application of BellSouth Corporation,)	
Pursuant to Section 271 of the)	
Telecommunications Act of 1934,)	WC Docket No. 02-150
To Provide In-Region, InterLATA Services)	
In Alabama, Kentucky, Mississippi, North)	
Carolina, and South Carolina)	
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COMMENTS OF AT&T CORP.

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
AT&T CORP.
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-4263

Mark E. Haddad
Ronald L. Steiner
SIDLEY AUSTIN BROWN & WOOD, LLP
555 West Fifth Street
Los Angeles, California 90013
(213) 896-6000

David Eppsteiner
AT&T CORP.
1200 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 810-4945

R. Merinda Wilson
Ronald S. Flagg
Alan C. Geolot
Richard E. Young
SIDLEY AUSTIN BROWN & WOOD, LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

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FCC ORDERS CITED

SHORT CITE	FULL CITE
<i>Access Charge Reform NPRM</i>	<i>Access Charge Reform</i> , Fifth Report And Order And Further Notice Of Proposed Rulemaking, 14 FCC Rcd. 14221 (rel. August 27, 1999).
<i>BellSouth Louisiana II Order</i>	Memorandum Opinion and Order, <i>Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana</i> , 13 FCC Rcd. 20599 (1998)
<i>Georgia/Louisiana 271 Order</i>	Memorandum Opinion and Order, <i>Joint Application of BellSouth Corporation et al. for Provision of In-Region InterLATA Services in Georgia and Louisiana</i> , CC Docket No. 02-35 (rel. May 15, 2002)
<i>KS/OK 271 Order</i>	Memorandum Opinion and Order, <i>Joint Application of SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Kansas and Oklahoma</i> , 16 FCC Rcd. 6237 (2001)
<i>Local Competition Order</i>	First Report and Order, <i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , 11 FCC Rcd. 15499 (1996), <i>aff'd in part and vacated in part by Iowa Utils. Bd. v. FCC</i> , 120 F.3d 753 (8th Cir. 1997), <i>aff'd in part and rev'd in part by AT&T Corp. v. Iowa Utils. Bd.</i> , 119 S. Ct. 721 (1999)
<i>Massachusetts 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Massachusetts</i> , 16 FCC Rcd. 8988 (2001)
<i>Michigan 271 Order</i>	Memorandum Opinion and Order, <i>Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan</i> , 12 FCC Rcd. 20543 (1997)
<i>New Jersey 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in New Jersey</i> , WC Docket No. 02-67 (rel. June 24, 2002)

REDACTED – FOR PUBLIC INSPECTION

SHORT CITE	FULL CITE
<i>NY 271 Order</i>	Memorandum Opinion and Order, <i>Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York</i> , 15 FCC Rcd. 3953 (1999)
<i>Non-Accounting Safeguards</i>	First Report and Order and Further Notice of Proposed Rulemaking, <i>Implementation of the Non-Accounting Safeguards of Section 271 and 271 of the Communications Act of 1934 as amended</i> , 11 FCC Rcd. 21905 (1996)
<i>Pennsylvania 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania</i> , 16 FCC Rcd. 17419 (2001)
<i>Texas 271 Order</i>	Memorandum Opinion and Order, <i>Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas</i> , 15 FCC Rcd. 18354 (2000)
<i>Vermont 271 Order</i>	<i>Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Vermont</i> , CC Docket No. 02-7 (rel. April 17, 2002)

**DECLARATIONS IN SUPPORT OF AT&T's OPPOSITION TO
BELLSOUTH'S SECTION 271 APPLICATION FOR
ALABAMA, KENTUCKY, MISSISSIPPI, NORTH CAROLINA
AND SOUTH CAROLINA**

WC Docket No. 02-150

EX.	DECLARANT
A	Denise Berger
B	Stephen Bickley
C	Jeffrey A. King
D	Michael Lieberman
E	Catherine E. Pitts
F	Steven E. Turner
G	Jay Bradbury/Sharon Norris
H	Cheryl Bursh/Sharon Norris

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COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these comments in opposition to BellSouth's joint application for authorization to provide in-region, interLATA services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina.

INTRODUCTION AND SUMMARY

BellSouth's recent 271 application for authorization to provide in-region, interLATA services in Georgia and Louisiana did "not earn a grade of 'A.'"¹ Although the Commission found BellSouth's performance minimally sufficient to satisfy the requirements of the competitive checklist, the Commission also noted numerous respects in which BellSouth's performance could and should improve. Indeed, the Commission expressed confidence that BellSouth would make the requisite improvements, and repeatedly stated its intent to respond seriously to any backsliding.

Unfortunately, the Commission's confidence was misplaced. BellSouth has not followed through. The many improvements that BellSouth promised to make have yet to materialize. In

¹ *Georgia/Louisiana 271 Order*, Statement of Commissioner Michael J. Copps.

several important respects, BellSouth's performance has deteriorated. Moreover, BellSouth has compounded these problems by taking several new affirmative steps to discriminate against competitors. In short, rather than improving the prospects for local competition, BellSouth is making them worse.

These anticompetitive developments should be of particular concern to the Commission in connection with the five states at issue here. Local competition has not irreversibly taken root in any of these states. To the contrary, BellSouth retains monopoly control of the residential local exchange market in each state. As the Consumer Advocate for the State of Carolina correctly observed in a complaint challenging BellSouth's recent and substantial price increases in local residential and business services, "there is a lack of a competitive alternative to control BellSouth's pricing behavior."²

It is therefore crucial to consumer welfare that this Commission ensure that BellSouth make all of the changes and improvements needed to establish meaningful and enduring local competition. The Commission should insist that BellSouth demonstrate full compliance with all of its checklist and market-opening obligations before granting BellSouth interLATA authorization for these five additional states.

Part I of these comments describes the important respects in which BellSouth has failed to meet its statutory obligations and the Commission's expectations with respect to providing nondiscriminatory access to operations support systems ("OSS"). First, BellSouth has not yet fully implemented the adequate change control process ("CCP") that, as the Commission has recognized, is crucial to the development and maintenance of successful local competition.

² *Philip S. Porter, Consumer Advocate for the State of South Carolina v. BellSouth Telecommunications, Inc.*, (S.C. PSC Tariff No. 2002-221) Complaint at ¶ 4 (filed July 5, 2002) (attached hereto as Ex. 1).

BellSouth has an enormous backlog of change requests, some more than two years old, that need to be made to its OSS, both to implement new features and to correct existing defects. On one hand, BellSouth claims that it lacks the capacity to make all of the needed changes in short order, and thus must set priorities to sequence the changes. On the other hand, however, BellSouth refuses to collaborate with CLECs in setting these priorities, and has misled the Commission as to the amount of time it will take to clear the backlog. As a result, contrary to the Commission's expectation that BellSouth will cooperate with CLECs on prioritization and eliminate most of its backlog of changes by the end of 2003, BellSouth has now made clear that it intends to proceed unilaterally to set priorities, to force CLECs to litigate their right to participate in priority-setting through protracted state proceedings, and to postpone elimination of the backlog of vital changes until well beyond 2003. This gross refusal to establish and follow a reasonable procedure for correcting defects in and updating its OSS denies CLECs equal access to BellSouth's OSS and substantially impairs CLECs' ability to compete with BellSouth.

BellSouth further impedes competition by continuing to violate its own procedures (as it recently did by misclassifying its own change request as "regulatory"), and by continuing to issue new software releases that contain numerous defects, many of which cannot be discovered by CLECs in pre-release testing because of the patent and conceded inadequacy of BellSouth's test environment. BellSouth is not meeting the Commission's expectations with respect to change control. Rather, the latest evidence – confirmed by KPMG's recent third-party test Draft Final Report in Florida – is that BellSouth's change-control and software-release performance is flawed and denies CLECs a meaningful opportunity to participate.

BellSouth's OSS performance is deficient in other important respects. Not only has BellSouth's flow-through performance not improved in recent months, but its performance in

May 2002 was noticeably *worse* than in prior months. BellSouth thus continues to rely excessively on manual processing of CLEC orders, which harms competition by delaying the return of CLEC order-status notices and the provisioning of CLEC orders, and by increasing the likelihood of errors in provisioning. BellSouth compounds the problem by continuing to make significant errors in CLEC bills, and by refusing to respond to CLEC billing complaints in a timely fashion. AT&T's experience once again is validated by the KPMG Draft Final Report on its OSS test in Florida, which notes that more than 40 "exceptions" and "observations" remain open even as that test nears completion, that for numerous areas of the test "significant issues remain unresolved," that the current status of 15 key test criteria is "Not Satisfied," and that 560 test criteria are "Incomplete," including all 542 in the Metrics test domain.

Moreover, as the Tennessee Regulatory Authority recently found, there is substantial variation in the performance of BellSouth's ordering systems from one state to the next, which cannot be fairly attributed to CLEC error. BellSouth's refusal to acknowledge and commit to correcting this lack of complete regionality in its OSS is itself a serious problem. Unless and until BellSouth makes appropriate and consistent improvements to its ordering systems, gross discrepancies in performance by state will continue to exist, and there can be no assurance that proceedings before any single state commission will lead to improvements in BellSouth's other states.

Part II describes BellSouth's failure to establish reliable and accurate means for monitoring BellSouth's performance. Here again, BellSouth has failed to meet the Commission's expectations. BellSouth continues to resist engaging with CLECs in any meaningful reconciliation of performance data. BellSouth further undercuts the ability of CLECs and third parties to monitor its performance by issuing erroneous reports on its

performance data, and by unilaterally changing its metrics. KPMG's recent report has confirmed these failings, faulting BellSouth for its improper implementation of its performance measure obligations, and opening new exceptions in Georgia and Florida to reflect KPMG's concerns. BellSouth's inaccurate performance reports compromise the effectiveness of its remedy plans and preclude effective deterrence and punishment of discriminatory performance. Moreover, Alabama has yet to finalize its remedy plan, while North Carolina has not even chosen the metrics that it will monitor, thus further confirming that this Application is premature.

Part III explains why BellSouth has not yet fully met its obligation to provide CLECs with nondiscriminatory access to interconnection. BellSouth has long reserved the right to define the geographic scope, within each LATA, of its local calling area. In many areas, it now offers customers extended area service plans that enable customers to make local calls to areas that otherwise would be treated as intraLATA toll. Yet BellSouth is effectively preventing AT&T from exercising equivalent flexibility to define its local calling areas by locking AT&T into a "Percentage Local Usage" ("PLU") factor that is geared to the way BellSouth, rather than AT&T, has defined the local calling area. The alternative to a reasonable PLU factor – building dedicated local trunk groups – is economically infeasible and unwarranted. Thus, by billing AT&T at switched access rates for calls that should be treated as local calls, BellSouth is denying AT&T the ability to interconnect its local network with BellSouth's on terms that are just, reasonable, and nondiscriminatory. This anticompetitive conduct also warrants denial of the Application.

Part IV explains that BellSouth has not fully implemented its obligation to set cost-based, nondiscriminatory rates. For example, BellSouth's daily usage feed ("DUF") rates in four of the states, and proposed new rates in the fifth state (North Carolina), are several times higher than

the rates that a TELRIC-compliant cost study would produce. BellSouth also charges non-cost-based switching rates in every state, and has compounded the problem by recently establishing, in three states, a new features rate that bears no rational relationship to BellSouth's underlying costs. Finally, BellSouth's North Carolina UNE rates are especially problematic. The loop rates (which exceed the Georgia and Louisiana benchmarks) are based on six-year old cost data that fail to reflect subsequent and significant cost-reducing developments, and the discriminatory nature of the North Carolina UNE rates is independently confirmed by the evidence that – even when all possible revenue sources are accounted for – margins are insufficient to accommodate new entry.

Part V explains why BellSouth's recent conduct precludes this Commission from finding that BellSouth will comply with its Section 272 obligations. BellSouth has now filed growth tariffs for switched access with this Commission and in all nine of its states that are designed and will operate to favor BellSouth's long distance affiliate at the expense of existing, large IXC's. BellSouth's new tariffs are designed so that small but rapidly growing long distance carriers (e.g., BellSouth's long distance affiliate) receive what BellSouth misleadingly calls "volume" discounts on switched access that are unavailable to carriers, like AT&T, that have far higher volumes, but that are unable to achieve growth rates sufficient to qualify for the discount. The North Carolina Utilities Commission has already suspended BellSouth's discriminatory tariff pending further review, and this Commission has previously and correctly held that such tariffs are discriminatory and impermissible. BellSouth's deliberate effort to favor its affiliate by filing growth tariffs that masquerade as volume discount plans is wholly incompatible with its promises to comply with Section 272, and is an independent and fully sufficient basis on which to deny the joint application.

Part VI explains why approval of this joint application is not in the public interest. The local markets in these five states are not irreversibly open to competition, and that alone should foreclose any finding that the application is “consistent with the public interest, convenience and necessity.” 47 U.S.C. § 271(d)(3)(C). Facilities-based competitors have managed to serve only 1 percent or fewer of the lines in each of the five BellSouth states, and in only one state (Mississippi) have UNE-based competitors managed to capture more than one-half of one percent of the residential lines. There is little prospect for improvement. The capital markets are now closed to CLECs, many of which are now either out-of-business or in severe financial distress. At the same time, barriers to entry remain high, reflecting BellSouth’s discriminatory access to OSS and interconnection, continuing anticompetitive conduct (including filing growth tariffs), and BellSouth’s above-cost UNE rates which, at least in North Carolina, are so high as to effect a “price squeeze” that alone precludes effective UNE-based residential competition.

If local competition is ever to emerge as an irreversible and meaningful constraint on BellSouth’s local monopoly, it will be only because this Commission has insisted that BellSouth fully meet its market-opening obligations. BellSouth is capable of providing – and under the Act is required to provide – CLECs with far better performance and prices. The Commission’s approval of BellSouth’s previous application has not spurred BellSouth to make the progress the Commission expected and on which it should now insist. Accordingly, the Commission should deny this joint application.

I. BELLSOUTH DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

Because “access to OSS functions falls squarely within an incumbent LEC’s duty under section 251(c)(3) to provide unbundled network elements under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale

services without imposing any limitations or conditions that are discriminatory or unreasonable,” a BOC seeking section 271 authority must demonstrate that it provides nondiscriminatory access to OSS. *New York 271 Order* ¶ 84 & n.203. The importance of this requirement cannot be overstated. “The Commission consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition,” *id.* ¶ 83, and that OSS “represent a significant potential barrier to entry.” *Local Competition Order* ¶ 516. Without nondiscriminatory access to the BOC’s OSS, competing carriers “will be severely disadvantaged, if not precluded altogether, from fairly competing” in the BOC’s local exchange markets. *New York 271 Order* ¶ 83 (“new entrants must have access to the functions performed by the incumbent’s OSS in order to formulate and place orders for network elements or resale services, to install service to their customers, to maintain and repair network facilities, and to bill customers”).

BellSouth asserts that the finding of the *Georgia/Louisiana 271 Order* that it provided nondiscriminatory access to its OSS “is equally applicable to the five states covered by this Application,” because “the OSS used in Georgia and Louisiana are the same OSS used across BellSouth’s entire nine-state region.” Br. at 59-60. That is not the case. The Commission’s finding in the *Georgia/Louisiana 271 Order* was based on the record before it and on the expectations of the Commission concerning BellSouth’s future OSS performance. However, events since the *Order* show that, rather than improve its OSS performance as the Commission expected, BellSouth is denying parity of access.

A. BellSouth’s Change Control Process Is Discriminatory

BellSouth’s performance in the area of change control illustrates its failure to comply with the Commission’s expectations. The *Georgia/Louisiana 271 Order* warned that “it is important that BellSouth continue to work collaboratively with competitive LECs through the

Change Control Process on prioritization issues, provide competitive LECs with sufficient information to be able to make informed decisions regarding prioritization of proposed systems changes, and implement changes in a timely manner.” *Georgia/Louisiana 271 Order* ¶ 193. BellSouth, however, has done precisely the opposite.

Far from collaborating with the CLECs on prioritization issues, BellSouth – over the objections of the CLECs – has unilaterally implemented a patently inadequate prioritization plan of its own. Bradbury/Norris Decl. ¶¶ 18-20. BellSouth refuses to consider any change to the CCP that would alter its current, exclusive control over the prioritization, implementation, timing, and sequencing of change requests. Although the dispute over these issues has been referred to the Georgia PSC, only recently did the GPSC even ask the parties to file comments on the issues, even though it had been aware of the impasse for some time. *Id.* ¶¶ 21-24.³ By refusing to cooperate and by forcing CLECs to resort to protracted state proceedings, BellSouth is effectively guaranteeing that CLECs will remain shut out of the change control process for the foreseeable future.

BellSouth has also refused to provide even the most fundamental information that CLECs need to make informed change-control decisions. *Id.* ¶¶ 26-30. For example, BellSouth denies CLECs information on all “sizing” (the amount of BellSouth’s limited capacity for making changes) that each pending change request will consume, and on the changes in the releases that BellSouth has scheduled for implementation in the remainder of 2002. *Id.* ¶ 26. BellSouth also denies CLECs the information they need to compare projected and actual release capacity. *Id.* ¶ 30. BellSouth is thus failing to provide CLECs with “sufficient information to be able to make

³ BellSouth’s description of the dispute between itself and the CLECs as involving only “three issues” is both incorrect and highly misleading. Bradbury/Norris Decl. ¶ 25. In reality, 25 issues are in dispute, and 18 of those issues involve the core issues of the prioritization and scheduling of feature change requests. *Id.*

informed decisions regarding prioritization of proposed systems changes.” *Georgia/Louisiana 271 Order* ¶ 193.

In addition, rather than implement change requests “in a timely manner” as the Commission expected, BellSouth continues to implement such requests at a rate that is unreasonably slow by any standard. *Id.* ¶¶ 31-40, 48-51, 55. BellSouth has already postponed the implementation of three releases scheduled for implementation in 2002. *Id.* ¶¶ 32. A substantial backlog of pending change requests awaits implementation – even though many of these requests date back two years, or more. *Id.* ¶¶ 33-39. BellSouth’s own data show that most of the change requests that it has implemented have simply involved corrections of defects in its systems, not feature changes desired by CLECs. In fact, on average, BellSouth has implemented fewer than three prioritized feature change requests per month during the last three years. *Id.*⁴

BellSouth’s abysmal record in implementing these requests, by itself, belies its suggestion (made to the Commission virtually on the eve of the issuance of the *Georgia/Louisiana 271 Order*) that it could eliminate 80 percent of the current backlog by the end of 2003. *Id.* ¶¶ 48-50.⁵ Under BellSouth’s actual release schedule, that backlog is likely to continue at its present level for the indefinite future. Other than the 12 feature change requests that it plans to implement during the remainder of 2002, BellSouth has made clear that it will implement no additional such requests until May 2003, at the earliest. *Id.* ¶¶ 37, 44, 48.

⁴ According to the data in BellSouth’s Application, only 87 (or 20 percent) of the 430 change requests implemented by BellSouth during the last three years were prioritized feature change requests initiated by BellSouth or the CLECs. Approximately 75 percent of all implemented change requests were simply corrections of defects in the OSS. Bradbury/Norris Decl. ¶ 55.

⁵ Although BellSouth advised the Commission in an *ex parte* letter filed the day before the issuance of the *Georgia/Louisiana 271 Order* – that “it is possible to eliminate approximately 80% of the ‘backlog’ of change requests by next year,” it makes no such claim in its Application. See *Georgia/Louisiana 271 Order* ¶ 193 n.738; Bradbury/Norris Decl. ¶ 41 n.22.

Moreover, BellSouth’s assertion that it could eliminate 80 percent of the backlog is based on flawed assumptions and scenarios, one of which – the absence of an industry standard release during 2003 – has already proven to be incorrect. *Id.* ¶¶ 41-47.

The extent of the backlog of change requests simply confirms that BellSouth, through its internal processes, exclusively decides what change requests will be implemented, and when – thereby denying CLECs a meaningful opportunity to compete. That fact was recognized by KPMG in its recently issued Draft Final Report on its third-party testing in Florida. *Id.* ¶¶ 51-54. KPMG found fundamental deficiencies in BellSouth’s prioritization process, and concluded that BellSouth had “not satisfied” three key criteria regarding that process. KPMG has thus confirmed that CLECs currently are denied a meaningful role in the prioritization of change requests. *Id.*

Events since the *Georgia/Louisiana 271 Order* have also disproved the Commission’s assumption that BellSouth provides a test environment that mirrors the production environment. *Georgia/Louisiana 271 Order* ¶¶ 187-189. For example, BellSouth acknowledges that defects in its Release 10.5, which was implemented in early June, were not discovered until after implementation because of differences between its “CAVE” test environment and the actual production environment. Bradbury/Norris Decl. ¶ 57. Moreover, when AT&T attempted to test BellSouth’s “parsed CSR functionality” in April 2002 (three months after the functionality had been implemented in commercial production), it received error messages, because that functionality had not been implemented in CAVE. *Id.* ¶¶ 58-60.

The failure of CAVE to reflect the production environment is particularly harmful to CLECs because BellSouth does not perform adequate internal testing of its releases prior to their

implementation. *Id.* ¶¶ 62-68.⁶ The Commission emphasized in its *Georgia/Louisiana 271 Order* that “software releases with numerous defects inhibit smooth transitions between releases,” and that it intended “to monitor BellSouth’s performance in that regard.” *Georgia/Louisiana 271 Order* ¶ 195. BellSouth, however, has continuously implemented releases with numerous defects. As KPMG found in its third-party testing in Florida, BellSouth “did not completely test code changes for Releases 10.2 and 10.3 prior to these releases going into production,” and implemented its Release 10.5 in June with “significant defects in the software.” Bradbury/Norris Decl. ¶¶ 63-68. Based on these findings, KPMG concluded in its Draft Final Report that BellSouth had not satisfied three test criteria, because BellSouth did not consistently follow either its “software/interface development methodology” or its Quality Assurance Process for new software releases. *Id.* ¶¶ 63-66.⁷

Finally, although the *Georgia/Louisiana 271 Order* found that BellSouth’s record regarding adherence to the CCP was not one “that warrants checklist noncompliance” (*Georgia/Louisiana 271 Order*, ¶ 194), BellSouth’s recent conduct shows that it has no intention of adhering to the CCP “over time.” *Id.*, App. D ¶ 40. Even as the Commission was approving its application for Georgia and Louisiana, BellSouth was abusing the CCP by classifying as a “regulatory” change request a change request that, when implemented, will make sweeping

⁶ The alternative, or “original,” test environment that BellSouth offers to CLECs does not fully meet the needs of CLECs because it cannot be used to test changes to an existing interface, other than a conversion from one industry standard to another. Bradbury/Norris Decl. ¶ 53 n.37.

⁷ Although BellSouth has offered to implement a “go/no go” voting procedure by which CLECs could seek to postpone the implementation of a scheduled release (due to defects discovered in the release itself or in the underlying documentation), BellSouth has undermined the utility of the procedure by insisting that only those CLECs who have actually tested the release in CAVE may participate in the voting. *See* Bradbury/Norris Decl. ¶¶ 60-61; Br. at 74; Stacy Aff. ¶ 115. BellSouth’s restriction is unreasonable, because many CLECs are unable to conduct testing prior to the implementation date of the release but may discover defects in the proposed release even without testing. Bradbury/Norris Decl. ¶ 61.

changes in all nine States of the BellSouth region. That classification was clearly improper, since: (1) the “regulatory” change is purportedly based on an order of the Mississippi PSC involving a request for an expanded area scope in one county of that State; and (2) BellSouth previously advised the Commission that the problem purportedly addressed in the change request was limited to *Georgia*. Bradbury/Norris Decl. ¶¶ 70-75.⁸ Similarly, BellSouth frequently fails to meet the timetables established by the CCP for implementation of “defect” change requests – and misclassifies a number of defect change requests as “feature” change requests to avoid those timetables. As a result of that misclassification, KPMG concluded in its recent Draft Final Report on the Florida test that BellSouth had failed to satisfy its criteria for the timeliness of the distribution of documentation regarding proposed defects. *Id.* ¶¶ 38-40, 76-78.

Because nondiscriminatory access to OSS is so vital to the success of any UNE-related local entry, BellSouth’s refusal to implement a fair process for promptly and accurately correcting system defects and accurately updating its OSS is of serious competitive concern. CLECs cannot justify substantial investments in local entry without confidence that they will be able consistently, over time, to rely on the availability and quality of the incumbent’s OSS. The inadequacy of BellSouth’s change control process seriously threatens the future viability of local UNE-based competition, and the Commission should therefore insist on proof that BellSouth has fully implemented its change control obligations before approving any more BellSouth 271 applications.

⁸BellSouth’s misclassification of the change request as “regulatory” removes it from the requirements of the CCP (including notification intervals and correction intervals) that would have applied if BellSouth had classified the request as a BellSouth-initiated (Type 4) change request or as a software defect (Type 6) change request. Bradbury/Norris Decl. ¶ 73.

B. BellSouth Provides Discriminatory Access To Ordering, Provisioning, and Billing Functions

In addition to its failure to establish and adhere to an effective CCP, BellSouth denies CLECs nondiscriminatory access to ordering, provisioning, and billing functions. *Id.* ¶¶ 81-112. Contrary to the Commission’s expectations, BellSouth continues to rely excessively on manual processing. In the *Georgia/Louisiana 271 Order*, the Commission stated that it “expect[ed] that BellSouth will continue to improve its flow-through performance,” and would “monitor BellSouth’s compliance with its commitment to improve its flow-through performance.” *Georgia/Louisiana 271 Order* ¶ 146.

BellSouth’s flow-through performance, however, has *not* improved, notwithstanding its claims to the contrary. *See* Br. at 84. In May 2002, for example, 20 percent of all electronically submitted local service requests (“LSRs”) fell out for manual processing due to system design or system errors by BellSouth. That manual processing rate not only shows no improvement, but is higher than the rate in some previous months. Bradbury/Norris Decl. ¶ 91.

BellSouth’s two reported flow-through rates similarly show no improvement in its performance. The “Percent Flow-Through Rate” – the flow-through rate on which BellSouth relies in its Application – was *lower* in May 2002 than in recent months. Bradbury/Norris Decl. ¶¶ 85-86. BellSouth’s Percent Flow-Through Rates have been equally deficient over the long term. For the last 16 months of reported performance data, the Percent Flow-Through Rates have never met the applicable benchmarks for resale orders (whether business or residential), and met the benchmark for UNE orders in only one month (January 2002). *Id.* ¶ 87.

BellSouth's other reported rate (the "Achieved Flow-Through Rate"), which is a more reliable indicator of BellSouth's performance, also has shown no improvement.⁹ These rates, like the Percent Flow-Through Rates, were *lower* in May 2002 than those in preceding months. *Id.* ¶ 88-90.

The decline in these flow-through rates simply shows that BellSouth has not kept its commitment to improve its performance. BellSouth's assertion that it has implemented 31 flow-through items as a result of the Flow-Through Task Force ("FTTF") is based on a contrived, grossly overstated calculation. *See id.* ¶ 94; Br. at 86.¹⁰ In reality, BellSouth has implemented only seven FTTF improvements to date in 2002, and plans to implement only six more during the remainder of the year. Even if BellSouth implements the additional items as scheduled, it will have implemented only thirteen such items for the entire year – barely two-thirds of what the Commission expected BellSouth to implement by May 2002. *Id.* ¶ 93; *Georgia/Louisiana* 271 *Order* ¶ 146 (noting BellSouth's representation that it had implemented eight additional "flow-

⁹ Consistent with the Commission's requirements, the Achieved Flow-Through Rate measures flow-through capability by excluding from its calculation all orders that fall out for manual processing due to "CLEC errors," while including only manual fall-out that is due to BellSouth system design or system error. Bradbury/Norris Decl. ¶ 88. The Commission's previous assumption that this rate excludes manual fall-out due to CLEC errors is simply incorrect. *See id.* ¶ 89; *Georgia/Louisiana* 271 *Order*, ¶ 143 n.507. By contrast, the Percent Flow-Through Rate overstates BellSouth's flow-through capability because it excludes not only orders due to "CLEC errors," but also fall-out caused by BellSouth system design, from its calculation. Bradbury/Norris Decl. ¶ 88. Regardless of whether the Percent Flow-Through Rate or the Achieved Flow-Through Rate is used, however, BellSouth cannot attribute the low levels of these rates to "CLEC errors," because *both* rates exclude such errors from their calculations. *Id.* ¶ 92. Nor can BellSouth fairly blame the CLECs' "business model[s]" or "market entry methods" for its deficient flow-through performance. *See* Stacy Aff. ¶ 60. If particular orders fall out because of the CLECs' "business models" or "market entry methods," they do so because BellSouth has chosen not to design their orders to flow through – a matter over which CLECs have no control. Bradbury/Norris Decl. ¶ 92.

¹⁰ For example, BellSouth reaches its figure of 31 "items" by counting the same change request nine times. In addition, 14 of the 31 items are described by BellSouth as corrections to errors in its systems. Bradbury/Norris Decl. ¶ 94; Stacy Aff., Exh. WNS-49.

through improvement features . . . in February and March 2002,” with “ten more improvements . . . targeted for implementation in May”).

The high level of manual fall-out of CLEC orders increases the likelihood of errors and delays in provisioning. Bradbury/Norris Decl. ¶¶ 83, 96, 99. In BellSouth’s case, that likelihood has become a reality. BellSouth renders poor performance in the areas of service order accuracy (the accuracy of the entry of manually processed orders into its systems by its Local Carrier Service Center) and provisioning accuracy. Even under BellSouth’s unilaterally-adopted methodology, BellSouth’s reported service order accuracy rates have frequently missed the applicable benchmarks in recent months, particularly for resale orders. *Id.* ¶¶ 97-98.¹¹ BellSouth’s performance in provisioning orders accurately is also deficient. In its Draft Report on the Florida third-party test, KPMG found that BellSouth had not satisfied test criteria regarding the accuracy of provisioning switch translations and directory listings. In both cases, BellSouth failed to provision the orders accurately 20 percent of the time, even on retesting. *Id.* ¶¶ 99-100.

BellSouth’s performance in providing CLECs with order status notices is equally inadequate. The receipt of timely, accurate, and complete order status notices is “[a]n important aspect of a competing carrier’s ability to serve its customers,” and an important factor in determining whether a BOC is in compliance with the competitive checklist. *New Jersey 271 Order* ¶ 93; *Georgia/Louisiana 271 Order*, App. D ¶ 36. BellSouth, however, has not provided CLECs with timely, accurate, and complete status notices. On average, BellSouth takes 18 hours

¹¹BellSouth’s poor performance in the area of service order accuracy is confirmed by the “attestation” of BellSouth’s “regionality” claim that was conducted by PriceWaterhouseCoopers, at BellSouth’s request. PWC found that approximately 20 percent of CLEC orders manually processed by BellSouth “experienced downstream edit errors.” Bradbury/Norris Decl. ¶ 97 & n.62.

to return a firm order confirmation or rejection notice for electronically submitted LSRs that fall out for manual processing. Regardless of whether the notice is a FOC or a rejection notice, the 18-hour delay will likely result in provisioning of the LSR on a due date later than that for a similarly situated BellSouth retail customer. *See* Bradbury/Norris Decl. ¶¶ 83, 105.

Moreover, as KPMG has found in its Draft Final Report on the Florida test, BellSouth's rejection notices are often inaccurate and incomplete. *Id.* ¶ 106. For example, contrary to established procedures, BellSouth often returns rejection notices that list only one error even when two or more such errors appeared on the LSR. BellSouth's inadequate systems thus require the CLEC to resubmit the order two or more times before it is finally accepted by BellSouth, needlessly driving up the CLEC's costs and impairing the CLEC's ability to provide timely service to new customers. *Id.* ¶ 107.

BellSouth also has failed to meet its obligation to provide nondiscriminatory access to its billing functions. *Id.* ¶¶ 108-112. As part of that obligation, "BellSouth must provide competing carriers with complete and accurate reports on the service usage of competing carriers' customers in substantially the same time and manner that BellSouth provides such information to itself, and wholesale bills in a manner that give competing carriers a meaningful opportunity to compete."¹² BellSouth, however, has not done so. Instead, the daily usage files and wholesale bills that AT&T has received from BellSouth have been replete with errors and omissions. For example, BellSouth has:

- Billed AT&T several hundred thousand dollars for originating switching charges even when the traffic originated on AT&T's switch;

¹²*Georgia/Louisiana 271 Order* ¶ 173. *See also, e.g., New Jersey 271 Order* ¶ 121 (as part of its OSS obligations, BOC must provide CLECs with "complete, accurate, and timely" wholesale bills and reports on the service usage of CLECs' customers); *Pennsylvania 271 Order* ¶ 13 (same).

- Billed AT&T monthly for one-time charges associated with collocations;
- Failed to bill AT&T for local minutes of use for a six-month period;
- Included past due balances on bills on new accounts;
- Sent *retail* bills to AT&T; and
- Assessed late charges against AT&T when payment on the bills was not overdue as defined in the parties' interconnection agreement.

Bradbury/Norris Decl. ¶ 112.

BellSouth compounds its deficient performance in billing by its lack of responsiveness to billing problems. BellSouth fails to resolve such problems in a timely manner, despite the requirement of the parties' interconnection agreement that claims for billing errors be resolved within 60 days of filing. *Id.* ¶ 110. In fact, BellSouth has taken six, or even ten, months before it has responded *at all* to some of the billing claims filed by AT&T. *Id.* ¶¶ 111-12.

The deficiencies in BellSouth's OSS are confirmed by KPMG's third-party testing in Florida. KPMG's recent Draft Final Report finds deficiencies in numerous areas of the OSS, including change management, pre-ordering, ordering, and provisioning – each of which is critical to a CLEC's ability to compete. *Id.* ¶¶ 113-14. As a result of the deficiencies that it found, KPMG concluded that "significant issues remain unresolved." *Id.* ¶ 114.¹³

Finally, BellSouth's argument that its OSS are "regional," and that the findings of the *Georgia/Louisiana 271 Order* regarding its OSS should therefore govern its Application here, are without merit. *See Br.* at 59-62. The *Georgia/Louisiana 271 Order* lends no support to

¹³BellSouth's suggestion that the Commission should consider the results of KPMG's testing in Georgia, but not the results of the Florida test, is illogical and inconsistent. *See Br.* at 67-70 & n.69. Quite simply, BellSouth cannot have it both ways. If, as BellSouth contends, its OSS are regionwide, then the results of *any* OSS testing in its region are relevant. The Florida test is, if anything, more relevant than the Georgia test, which was narrower in scope. Although BellSouth suggests that there is no evidence that the problems found in the Florida test are

BellSouth’s “regionality” claim, since the Commission expressly limited its finding of “sameness” to the “OSS as it functions in Georgia and Louisiana” – not to the five States that are the subject of BellSouth’s current application. *Georgia/Louisiana 271 Order* ¶¶ 106, 110-111. Moreover, as a majority of the Tennessee Regulatory Authority recently concluded, BellSouth has not shown that its OSS are the same in each of the States in its region. Bradbury/Norris Decl. ¶ 123 & Att. 32 at 30-54, Att. 33 at 42. The TRA also correctly noted that the flow-through rates for orders for local number portability (“LNP”) – which probably constitute the most homogeneous type of order submitted by CLECs – show a substantial variation from State to State that can only be attributable to a differences in the OSS among the States.¹⁴ In fact, the significant variation in flow-through rates from State to State is not limited to LNP orders, but includes the flow-through rates (both Percent Flow Through and Achieved Flow through) for residential resale orders, business resale orders, and UNE orders. Bradbury/Norris Decl. ¶¶ 127-31.

The substantial variation in BellSouth’s performance from State to State is the result of its implementation of different legacy systems, and different programs, in each of the States in its

“systemic,” at least some of the problems discussed in the KPMG Draft Report involve areas (such as change management) that are clearly regionwide. *See* Bradbury/Norris Decl. ¶ 117.

¹⁴*See* Bradbury/Norris Decl. ¶¶ 124-25, 127-30. BellSouth’s characterization and criticisms of the TRA’s decision border on the frivolous. *See* Br. at 66 n.38; Stacy Aff. ¶¶ 55-60. The TRA’s findings regarding regionality were those of a majority of the TRA – not, as BellSouth suggests, of a single Director. Furthermore, although BellSouth criticizes the TRA for averaging the flow-through rates for local number portability (“LNP”) orders, the TRA’s decision rested not only on its analysis of flow-through rates, but on BellSouth’s failure to present sufficient evidence that its OSS are regionwide. BellSouth makes no attempt to show the extent (if any) to which any “averaging of the averages” by the TRA overstates the variation in LNP flow-through rates from State to State. Bradbury/Norris Decl. ¶¶ 126-27. In any event, even an examination of the LNP flow-through rates on a month-by-month basis shows that, as the TRA concluded, such rates vary substantially from State to State – and that variation can only be attributable to differences in the OSS from State to State. *Id.* ¶¶ 127-30.

region. *Id.* ¶¶ 142-43. Even if the interfaces and “middleware” of the OSS are the same throughout the BellSouth region, the legacy systems are State-specific – and it is the interaction of the interfaces and middleware with the different legacy systems that produces the difference in flow-through performance. *Id.*

The PriceWaterhouseCoopers “attestation” on which BellSouth relies (and which BellSouth mischaracterizes as an “audit”) lends no support to its regionality claim. *Id.* ¶¶ 133-41; Br. at 67-69. The reliability of the PWC “attestation” would be suspect in any event, given the limitations that BellSouth imposed on the employees that PWC could interview and PWC’s close ties to BellSouth. Bradbury/Norris Decl. ¶ 134. PWC’s “attestation” was fatally flawed in other respects. For example, PWC based its analysis on a definition of “sameness” of the OSS that BellSouth had established and that did not involve an assessment of State-specific performance data. *Id.* ¶¶ 135-37. PWC’s analysis was incomplete even under BellSouth’s definition of “sameness,” since PWC did not determine whether (as BellSouth’s definition specified) there was “one unique set of software coding.” *Id.* ¶ 138.

BellSouth has therefore failed to show that its OSS in the five States that are the subject of its Application are the same in all respects as those in Georgia or Louisiana (or, for that matter, in any other State in its region). This alone should foreclose any facile claim that approval of BellSouth’s OSS performance in Georgia and Louisiana mandates approval here, or that changes that one BellSouth state imposes will necessarily improve performance in a different BellSouth state. In some respects, however, such as change management, BellSouth’s OSS are indeed “regionwide,” and evidence regarding those aspects of its OSS from any State in its region — including KPMG’s third-party test in Florida — is relevant here.

II. BELLSOUTH’S PERFORMANCE DATA DO NOT SHOW CHECKLIST COMPLIANCE

There is no sound basis for BellSouth’s claims that its performance data are accurate, and that its data demonstrate checklist compliance. In an attempt to lend color to its allegations, BellSouth attempts to portray these issues as all but settled as a result of the Commission’s *Georgia/Louisiana 271 Order*. Nothing could be further from the truth.

Based upon the evidence of record, the *Georgia/Louisiana 271 Order* found that BellSouth’s data are accurate. *Georgia/Louisiana 271 Order* ¶ 19. That record evidence included various commitments made by BellSouth to implement corrective steps to eliminate errors in its performance monitoring processes, engage in data reconciliation, and improve its performance. In its *Georgia/Louisiana 271 Order*, the Commission emphasized, however, that its finding regarding the accuracy of BellSouth’s data was based upon the record developed at that time, and that its assessment could change if “new evidence became available. . . .that demonstrated that there are significant problems with the metric data.” *Georgia/Louisiana 271 Order* ¶ 20 n. 72. Indeed, the Commission stated that “access to complete and accurate data will be important to the Commission’s assessment of BellSouth’s future performance.” *Georgia/Louisiana 271 Order* ¶ 20. Whatever record was developed in the *Georgia/Louisiana 271* proceeding, BellSouth’s conduct and performance since the Commission’s issuance of that decision reveal that its reliance on the *Georgia/Louisiana 271 Order* to support its current Application is misplaced.

In the *Georgia/Louisiana 271* proceeding, commenters argued that BellSouth’s performance data were unreliable because BellSouth unilaterally modified and redefined the business rules governing performance measures. Bursh/Norris Decl. ¶¶ 12-13. The Department of Justice and the Staffs of the Georgia Public Service Commission and Louisiana Public Service

Commission agreed that any changes to the methodology for calculating performance results should only be made with (1) prior written notice allowing sufficient time for comment and (2) the prior approval of the State Commission. *Id.* Critically, this Commission endorsed “the recommendations by both the Georgia and Louisiana Commission staffs that would require BellSouth to provide prior notice of any proposed changes to the calculation of performance measures prior to implementation.” *Georgia/Louisiana 271 Order*, ¶ 159 n.575.

In its Application, BellSouth contends that its commitment “to ensuring that it provides advance notice to regulators and affected CLECs of changes in the way the performance data are calculated” is evidenced by its May 23 and June 4 notices which purportedly advised the CLECs and the GPSC of metrics changes that it planned to implement with its April 2002 data. Varner Aff., ¶ 111. BellSouth’s contentions are meritless.

BellSouth’s May 23 “notice” ostensibly was designed to notify the GPSC and CLECs about 24 metrics changes it planned to implement with its April data. Bursh/Norris Decl. ¶ 15. However, BellSouth issued its May 23 “notice” two days after it posted its preliminary April performance results – results which reflected the metrics changes that BellSouth had already implemented. Significantly, BellSouth never obtained the prior approval of the GPSC before implementing these changes. Thus, BellSouth’s May 23 “notice” was nothing of the sort and cannot legitimately be characterized as the kind of advance notice that this Commission endorsed in its *Georgia/Louisiana 271 Order*. Bursh/Norris Decl. ¶ 16.

BellSouth compounded this transgression by issuing yet another so-called “notice” on June 4 which identified even more changes that BellSouth planned to implement with its April 2002 data. BellSouth issued its June 4 “notice” at 4:06 p.m. and posted its final April performance results at 6:54 a.m. on June 5. Given these circumstances, BellSouth cannot

seriously contend that the 15 hour interval that elapsed between its June 4 notice and the posting of its data constituted ample time for parties to comment on the changes and the GPSC to render a determination. *Id.* ¶ 17.

Because of BellSouth's unilateral conduct, the Southeastern Competitive Carriers Association filed an emergency motion before the GPSC, requesting that the GPSC require BellSouth to comply with procedures for implementing metrics changes. Although this motion has been resolved by the GPSC and a settlement has been reached, it remains to be seen whether BellSouth will cease its practice of unilaterally modifying the performance measures. Moreover, these recent events since the *Georgia/Louisiana 271 Order* show that BellSouth has completely undermined the ability of CLECs and third-parties to evaluate its performance by redefining the metrics whenever it suits BellSouth's purpose.

In finding that BellSouth's performance data are accurate and reliable, the Commission in its *Georgia/Louisiana 271 Order* cited, with approval, BellSouth's stated willingness "to engage in data reconciliations with any requesting carrier." *Georgia/Louisiana 271 Order* ¶ 18 (footnote omitted). BellSouth contends that the Commission's finding applies with undiminished force here because BellSouth has a "group of employees designated" to engage in data reconciliation with the CLECs to assure the reliability of BellSouth's data. *Varner Aff.* ¶ 124. Here again, BellSouth has failed to meet the Commission's expectations.

BellSouth's conduct since the Commission's issuance of the *Georgia/Louisiana 271 Order* demonstrates that BellSouth has not engaged in any meaningful way in the data reconciliation process. *Bursh/Norris Decl.* ¶¶ 22-34. AT&T has yet to receive adequate responses to detailed questions that it posed to BellSouth in early February 2002 regarding numerous discrepancies and inconsistencies in BellSouth's performance data. In some instances,

it has taken BellSouth months to respond to AT&T's inquiries. Worse yet, BellSouth's responses have consisted, in large measure, of highly generalized statements that fail to address AT&T's specific concerns, or that offer conflicting and erroneous explanations. Because of BellSouth's lack of responsiveness, AT&T was forced to send an escalation letter to BellSouth on May 17, 2002. BellSouth's rejoinder on June 17 – in which BellSouth insisted that it provided sufficient answers to AT&T's inquiries – was nothing short of remarkable. Reminding BellSouth of its commitment during the *Georgia/Louisiana 271* proceeding to engage in data reconciliation, AT&T demanded a meeting with BellSouth to resolve these issues. Although BellSouth recently informed AT&T that it is willing to meet to discuss these issues, the fact remains that over four months have passed since AT&T first raised these data integrity concerns and it has yet to receive an adequate response from BellSouth. This recent history confirms that BellSouth's promises to engage in data reconciliation have proven to be illusory. *Id.* ¶ 34.

In concluding that BellSouth's data are accurate, the Commission in its *Georgia/Louisiana 271 Order* also cited BellSouth's representations that it had resolved problems that led to errors in its performance results. *Georgia/Louisiana 271 Order*, ¶ 19 n.69. However, the record that has developed since the Commission's *Georgia/Louisiana 271 Order* shows that BellSouth's performance data are demonstrably unstable, and that its reported results should be eyed with suspicion.

As a result of discovery in State proceedings, BellSouth's responses to KPMG's exceptions and observations opened in Florida, and the data that BellSouth has generated since the Commission's issuance of its *Georgia/Louisiana 271 Order*, it is clear that BellSouth's performance data are riddled with error. Bursh/Norris Decl. ¶¶ 35-62. These errors have manifested themselves in a variety of ways including: internal inconsistencies in order volumes;

improper exclusion and inclusion of transactions; violations of the business rules governing performance measures; and improper calculations of performance results.

Moreover, although BellSouth claims that the metrics audits in Georgia and Florida confirm the reliability of its data, these audits, if anything, undercut BellSouth's claims. Bursh/Norris Decl. ¶¶ 63-75. KPMG has reported that its data integrity testing in Georgia and Florida has been delayed because of inaccurate and incomplete transformation documentation which precluded it from testing numerous metrics in the PMAP 2.6 environment. KPMG Draft Final Report, Metrics-70. Because its testing of BellSouth's metrics based upon PMAP 4.0 is in progress, KPMG also reported in Florida that it "cannot and does not verify the accuracy" of BellSouth's commercial data at this time. *Id.* Appendix G.

Most important, in both the Florida and Georgia metrics audits, KPMG has issued exceptions and observations because of BellSouth's improper implementation of its performance measures. In both audits, KPMG recently found that BellSouth has improperly excluded transactions in data used to calculate its performance results. These exclusions are not trivial. In the Florida test, KPMG recently opened a new exception, finding that BellSouth had improperly excluded over 3,000 records from its performance data. These recent events belie BellSouth's claim that the metrics audits confirm that its data are trustworthy.

Remarkably, even BellSouth's own inadequate data show that it has not satisfied its Section 271 obligations. BellSouth's own results are littered with performance failures. BellSouth's commercial data show that its ordering and provisioning capabilities are plagued by high rates of order rejections, manual processing, and manual errors. BellSouth's own results show that it does not provide timely status notices to CLECs, which are critical to a CLEC's ability to compete. In addition, BellSouth's reported results show that its provisioning of CLEC

orders is discriminatory, and that it has failed the performance standards for numerous maintenance and repair and billing measures. Bursh/Norris Decl. ¶¶ 76-200. For all of these reasons, BellSouth has not met and cannot meet its burden of demonstrating that its performance data are accurate, and that those data show that it has satisfied its Section 271 obligations.

III. BELLSOUTH DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO INTERCONNECTION

BellSouth has not fully implemented its obligation to provide CLECs with reasonable and nondiscriminatory access to interconnection. In particular, BellSouth denies AT&T and other CLECs the practical ability, currently enjoyed by BellSouth, to define the scope of their local calling areas and to exchange local traffic with BellSouth based on the CLEC's definition, rather than BellSouth's definition, of the local calling area. This conduct is not only discriminatory but also highly anticompetitive. It directly affects AT&T's ability to implement its market-entry plans and provide customers with attractive alternative local services to what BellSouth offers.

Section 271(c)(2)(B)(i) requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(i).¹⁵ Thus, BellSouth's application may not be granted unless BellSouth has fully implemented its obligation to provide interconnection "at any technically feasible point within the carrier's network" and "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [section 251] and section 252." 47 U.S.C. §§ 251(c)(2)(C), (D).

¹⁵ Section 251(c)(2) imposes a duty on ILECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2)(A). The Commission has concluded that "interconnection" in section 252(c)(2) refers "only to the physical linking of two networks for the mutual exchange of traffic, . . . and not the transport and termination of traffic." *Local Competition Order* ¶ 176.

In particular, the Commission has made clear that, under Section 251(c)(2) and its implementing rules, “an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA.” *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, ¶ 112 (2001); *Texas 271 Order* ¶ 78; *Kansas/Oklahoma 271 Order* ¶¶ 234-36. The statute and the Commission’s rules also unambiguously require ILECs to “establish reciprocal compensation arrangements,” *id.* § 251(b)(5), that provide for the “mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier” and that do so through charges set at a “reasonable approximation of the additional costs of *terminating* such calls.” *Id.* § 252(d)(2)(A)(i), (ii) (emphasis added). These rules thus establish that a CLEC is entitled to designate the entire LATA as its local calling area, and that an ILEC may charge only TELRIC rates for transport and termination on its side of the POI, and not access charges.

BellSouth has yet to meet these obligations. BellSouth reserves the right to define the boundaries, within any given LATA, of its local calling area. In many areas throughout its region, BellSouth has chosen to offer customers extended area service plans that expand the customer’s local calling area to include calls to many areas that would otherwise be designated intraLATA toll areas. Berger Decl. ¶ 6.

AT&T and other CLECs need the same flexibility that BellSouth enjoys to define their local calling area within a LATA. Indeed, AT&T’s marketing plans in BellSouth’s region are designed with the expectation that AT&T will be able to offer consumers a local calling area that encompasses the entire LATA in which the customer resides. Although BellSouth has not

stopped AT&T from marketing such a product to customers, BellSouth is making it impossible – as a practical matter – for AT&T to continue to offer LATA-wide local area plans. Berger Decl. ¶ 7.

BellSouth is implementing this discriminatory policy by insisting that AT&T and other CLECs compensate BellSouth at switched access rates for any intraLATA calls that originate or terminate outside the local calling area as BellSouth has defined it. With AT&T, BellSouth simply refuses to accept the higher Percentage Local Usage (“PLU”) factor that results from AT&T’s offer of LATA-wide local calling. Rather, BellSouth is insisting on using the PLU factor that AT&T provided before implementing its LATA-wide local calling plan. As a result, while AT&T is providing local service to customers on a LATA-wide basis, AT&T is being forced to compensate BellSouth at switched access rather than reciprocal compensation rates for that portion of the traffic that originates or terminates outside the BellSouth-defined calling areas. That requirement makes it uneconomical for AT&T to offer LATA-wide local calling. Berger Decl. ¶¶ 11-13.

By refusing to honor AT&T’s increased PLU factor, BellSouth is effectively freezing AT&T into its original local calling areas and denying AT&T the ability to offer a competitive service to its customers. Notably, AT&T has no practical alternative to having BellSouth accept its current PLU. AT&T theoretically could sidestep BellSouth’s PLU barrier by building separate trunk groups dedicated to local traffic, for which BellSouth would pay reciprocal compensation without employing a PLU factor. But building separate trunks for local traffic is also not a practical alternative, because installing separate toll and local interconnection facilities would be enormously expensive and wasteful, and would also preclude AT&T from offering

LATA-wide local service. Use of a reasonable PLU factor, by contrast, promotes efficient use of trunking facilities. Berger Decl. ¶ 14.

BellSouth's obstruction of AT&T's ability to provide intraLATA extended area local calling is particularly unjustifiable given that AT&T sought and received the right to offer such a product in the interconnection agreements ("ICAs") it negotiated with BellSouth. Berger Decl. ¶¶ 9-10. In those ICAs, BellSouth and AT&T agreed that AT&T could treat calls that originate and terminate within a single LATA as local calls. *Id.* Having reached such an agreement, it is particularly destructive to AT&T's ability to execute its marketing plans to have BellSouth walk away from its interconnection obligations on which AT&T significantly depends. Berger Decl. ¶ 15. AT&T's ability to offer local services is significantly affected by the rates, terms and conditions on which BellSouth provides interconnection. Any uncertainty about whether BellSouth will comply with the terms of its ICAs is necessarily an anti-competitive disruption to AT&T's business plans, unsettling AT&T's ability to forecast sales, estimate revenues, or allocate expenses, and ultimately serving to delay and deter successful competitive local entry. *Id.* BellSouth's refusal to provide CLECs the same latitude that BellSouth enjoys to define local calling areas is thus both discriminatory and anti-competitive. Until BellSouth provides interconnection arrangements that provide CLECs with ability equal to BellSouth's to define their local calling areas, BellSouth will not have fully implemented its interconnection obligations.

IV. BELLSOUTH’S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO.

The Commission should deny the joint application for yet another reason. BellSouth has failed to demonstrate that it has fully implemented its obligation to set cost-based recurring and non-recurring rates that are consistent with the Commission’s TELRIC methodology. In particular, BellSouth’s daily usage feed (“DUF”) rates in four of the states, and proposed new rates in the fifth state (North Carolina), far exceed the rates that a TELRIC-compliant cost study would produce. BellSouth has also established, in three states, a new rate that is ostensibly designed to recover the cost of providing features, but that in fact raises the switching costs for every CLEC customer in ways that bear no rational relationship to BellSouth’s underlying costs. This new “features port-additive rate” compounds the continuing inflation in BellSouth’s switching rates that exists in all five states, and independently requires a finding that BellSouth’s switching rates are not cost-based.

The evidence further shows that UNE rates in North Carolina, and in particular the loop rates, are not cost-based. These rates, which are based on six-year old cost data that fail to reflect enormous cost-reducing changes that have occurred since then, exceed the “benchmark” loop rates in both Georgia and Louisiana. That UNE rates in North Carolina are discriminatory is independently confirmed by the evidence that – even when all possible revenue sources are accounted for – the UNE rates fail to provide a sufficient margin to permit new entry in North Carolina.

A. BellSouth’s DUF Rates Are Inflated By Clear TELRIC Errors

The DUF charge is a fee that BellSouth charges CLECs for information regarding CLECs’ service usage. CLECs use that information to verify the accuracy of BellSouth’s bills

and as a basis for billing their own customers.¹⁶ As the Commission noted in the *Georgia/Louisiana 271 Order*, BellSouth has to demonstrate that its DUF rates are consistent with TELRIC, and this review is conducted separately from switching and OSS issues. *Georgia/Louisiana 271 Order*, ¶¶ 85-86. BellSouth has not made, and cannot make, this showing. BellSouth's DUF rates for Alabama, Kentucky, Mississippi and South Carolina are based on the same DUF cost study. As explained in the Declaration of Steven Turner, the BellSouth cost study contains numerous clear TELRIC errors that make these DUF rates several times higher than cost-based rates. Turner Decl. ¶¶ 6-16.

North Carolina's DUF rate is even further off-base. The current North Carolina DUF rate is not based on the DUF cost study used in the other four states, and is multiples higher than the already-inflated DUF rates in the other four jurisdictions. Turner Decl. ¶¶ 17-22. Because BellSouth incurs DUF charges on a region-wide basis, there is no cost basis for any such disparity in DUF rates. In the current North Carolina cost proceeding, BellSouth has proposed DUF rates similar to the DUF rates in the other four states. Nevertheless, BellSouth cannot fairly claim that its current North Carolina DUF rate – almost 7 times the level of the other four applicant states – is TELRIC-compliant. Future promises of lower rates cannot serve as the basis

¹⁶ BellSouth offers three types of DUFs in the applicant states: the Access Daily Usage File (ADUF); the Optional Daily Usage File (ODUF); and the Enhanced Optional Daily Usage File (EODUF). ADUF provides the CLEC with records for billing interstate and intrastate access charges, whether the call was handled by BellSouth or an IXC. ADUF also provides records for billing reciprocal compensation charges to other local exchange carriers and IXCs for calls originating from and terminating to unbundled switch ports. ADUF includes records for both originating and terminating traffic. ODUF contains information on billable transactions for resold lines, interim number portability accounts, and unbundled switch ports. For end users who are served by resold lines, interim number portability, or unbundled switch ports (including the UNE-platform), a competitive LEC can use ODUF to bill for usage events associated with calls placed by those end users (e.g., *69, operator assistance). EODUF is an enhancement to ODUF and includes usage records for local calls originating from a reseller's flat-rated lines (BellSouth's retail flat-rated local service offering purchased for resale). *Georgia/Louisiana II Order*, ¶ 85 n.292.

for Section 271 approval. *Michigan 271 Order* ¶ 55. Also, there is no true-up provision in the North Carolina cost proceeding by which CLECs can recover overcharges of BellSouth's North Carolina DUF rate. Turner Decl. ¶¶ 21-22. As to North Carolina, BellSouth has not shown and cannot show that its DUF rates comply with TELRIC.

In any event, even the proposed DUF rates for North Carolina, like the new DUF rates for Alabama, Kentucky, Mississippi and South Carolina, far exceed any level that could fairly be deemed cost based. This is evident from six clear TELRIC errors in the cost study on which these rates are based. *Id.* ¶¶ 23-25.

First, BellSouth failed to determine DUF rates by assessing the total DUF costs against the total volume of DUF messages. Instead, BellSouth has based DUF rates on smaller numbers of CLEC messages without taking into account BellSouth's similar usage. This failure to include all DUF messages in the determination of costs overstates CLEC DUF rates. *Id.* ¶¶ 26-28. Moreover, BellSouth arbitrarily and erroneously assigned certain costs of processing DUF requests to CLECs alone, and then divided those costs by the volume of CLEC messages. This methodology has enabled BellSouth substantially to inflate the DUF charge by grossly misallocating costs to CLECs. For example, although BellSouth processes 50 times more BellSouth messages than CLEC messages, BellSouth allocates equivalent amounts of labor to each. *Id.* ¶ 29. BellSouth's allocation of fifty times more costs on a per message basis to CLECs than to BellSouth obviously and arbitrarily overstates CLEC costs. *Id.* ¶ 30.

Second, BellSouth uses differing cost recovery periods in developing its cost estimates for different types of DUF messages. Although the costs for all DUF messages are assigned to an asset class having an economic life of five years, BellSouth uses cost recovery periods of three years for ODUF and EODUF messages, and ten years for ADUF messages, and then

amortizes the investment over a five-year period. BellSouth witnesses have conceded that the choice of the ten-year cost recovery period for ADUF was designed to allow a higher level of costs to be spread over a longer period. The use of these inconsistent cost recovery periods further overstates BellSouth's DUF costs. Turner Decl. ¶¶ 31-32.

Third, BellSouth takes one-time system investment costs incurred in the first year and includes those costs in four subsequent years. BellSouth's documentation makes clear that such costs are start-up investments required only in the first year, but it nonetheless seeks to recover this investment five times. Once should be enough. BellSouth's actions lead to a significant cost over-recovery in violation of TELRIC principles. Turner Decl. ¶¶ 33-34.

Fourth, BellSouth misallocates system development costs. BellSouth properly classifies labor hours associated with system development as capital expenses. Inexplicably, however, BellSouth treats the associated computer resource costs as annual expenses rather than capital costs. BellSouth's attempt to treat these costs as a current expense is inconsistent with cost accounting and TELRIC principles. Turner Decl. ¶¶ 35-36.

Fifth, BellSouth offers CLECs the option of receiving DUF records electronically or by magnetic tape. BellSouth inappropriately includes the cost of the magnetic tape in its general messaging processing cost. As a result, the costs of the magnetic tape are charged to all CLECs, including those CLECs that elect to receive the electronic feed. Clearly, only those CLECs that choose to receive the magnetic tape should pay for the costs of such service. *Id.* ¶¶ 37-38.

Finally, BellSouth understates the quantity and growth rate of DUF messages in making projections to determine DUF costs. In making these projections, BellSouth ignores recent actual DUF message growth data and arbitrarily makes assumptions that lower DUF message

projections. As a result, DUF costs are spread among a smaller universe of messages and are improperly inflated. Turner Decl. ¶ 37-38.

These errors serve to inflate DUF costs by several times over cost-based levels. *Id.* ¶¶ 23-25. Accordingly, BellSouth’s DUF rates do not comply with TELRIC principles and fail to satisfy the requirements of Checklist Item Two.

B. BellSouth’s Switching Rates Fail to Comply with TELRIC Principles

In each of the applicant states, BellSouth has generally used the same switching cost rate methodology to derive switching rates. As set forth in detail in the Declaration of Catherine Pitts, BellSouth’s switching rates include several clear TELRIC errors that overstate switching rates.

First, until very recently, in three of the states, Alabama, Mississippi, and South Carolina, BellSouth levied a “feature port additive” rate, which is an additional fixed monthly rate charged to CLEC customers who use BellSouth features. This unwieldy average of inflated feature cost components is charged to any customer who orders one – or a dozen – features. Recognizing that its feature port additive rate is in no way TELRIC-compliant, BellSouth recently dropped the separate feature port additive rate in SGAT filings in Alabama, Mississippi, and South Carolina, while at the same time increasing its flat port charge by an amount equal to 55% of the former feature port additive rate. The result – that every customer pays a portion of BellSouth’s inflated features charge – no more complies with TELRIC than does the original, flawed, feature port additive rate. Pitts Dec. ¶¶ 17-25.

This new flat port rate is not cost-based, and it simply compounds the TELRIC errors that inflate BellSouth’s switching rates. Four other TELRIC errors include flawed switch discount calculations, embedded trunking cost calculations, inappropriate assumptions of combination local/tandem switches, and improper allocation of “getting started” costs to usage and features.

Id. ¶¶ 5-16. Together, these errors preclude any finding that BellSouth’s switching rates satisfy Checklist Item Two.

In the *Georgia/Louisiana 271 Order*, the Commission rejected a challenge to Louisiana’s minute-of-use based feature rate due to the Louisiana Commission’s “fact-sensitive and state-specific determination.” *Georgia/Louisiana 271 Order* ¶ 84. In the Alabama and South Carolina UNE rate proceedings, the features charges were a contested issue, but there were no “fact-sensitive and state-specific” determinations of the kind discussed in the *Georgia/Louisiana 271 Order* supporting BellSouth’s feature port additive rate. This rate represents an average of various features, and a customer pays the feature port additive rate upon ordering one – or ten – features. A basic TELRIC principle is that costs should be associated with the cost-causing element. *Local Competition Order* ¶ 691. On this basis, BellSouth’s “average” feature port additive rate fails to comply with TELRIC principles in charging the same “averaged” feature rate whether a customer incurs the costs associated with one feature or with a dozen features.

Moreover, BellSouth’s calculation of this “average” feature port additive rate is nonsensical. As demonstrated in the Declaration of Catherine Pitts, BellSouth reviewed 56 features to develop “average” feature and usage information. In so doing, BellSouth took features whose costs were derived on different bases – by usage, by hunt group, and by attendant -- and then combined these disparate numbers to develop an “average” usage on a per-port basis. Such an approach makes no analytical sense, as it is not possible to mix these totally different types of costs to develop a meaningful “average.” Pitts Decl. ¶¶ 17-19.

BellSouth also failed to take into account usage characteristics based on the penetration ratios of different features. Indeed, over 40% of the 56 features that BellSouth reviewed had no customers, and only 12 features had penetration ratios in excess of one percent. Nonetheless,

BellSouth gave all 56 features equal weight in deriving its “average” feature port additive rate.¹⁷ Thus, a high-cost but low-usage feature such as six-way conference calling received equal weighting with low-cost, high-usage features such as Caller ID. BellSouth’s methodology results in the implicit and wrong assumption that a six-way conference circuit is used just as often as a three-way conference circuit, thus inflating the “average” feature port additive cost. Pitts Decl. ¶¶ 20-22.

Given these significant problems with BellSouth’s feature port additive rate, it is not surprising that BellSouth sought to paper over the problem by unilaterally changing its feature port additive rate in Alabama, Mississippi, and South Carolina just prior to this Section 271 application. BellSouth revised its SGATs to delete the separate feature port additive rate and add 55 percent of that rate, representing BellSouth’s claimed “take rate” for features, to the monthly flat port rate. Under the revised SGATs, *all* customers now pay for features without regard to whether the customer orders one, many, or any features.¹⁸ Pitts Decl. ¶ 23.

This revised proposal does not solve the fundamental problem of BellSouth’s overstated features charge. To the contrary, BellSouth has made the problem worse, because it now assesses this overstated features charge to all customers – even those who have not ordered any features. In this regard, BellSouth’s use of the 55 percent “take rate” is totally unsubstantiated.¹⁹ The only BellSouth feature to achieve a 55 percent penetration level in the region is Code

¹⁷ BellSouth also incorrectly assumed that Nortel and Lucent switches processed feature calls in the same manner, which resulted in the misallocation and double counting of switching costs. Pitts Decl. ¶ 21.

¹⁸ BellSouth also stated that it would continue to make available the separate features port-additive rate available to CLECs through interconnection agreements.

¹⁹ There is no discussion of the derivation of the 55 % feature “take rate” in the Ruscilli and Cox Affidavit at ¶ 19.

Restriction and Diversion, which is used to block calls to 900 services, and the next most popular feature, Caller ID, has only a 37 percent penetration rate. Moreover, even if the 55 percent feature take rate were correct, that penetration level would apply only to one popular feature, and not to the “average” rate developed by BellSouth. BellSouth’s use of the 55 percent “take rate” allows BellSouth to recover from all CLEC customers the overstated “average” feature cost of high-priced, but little used, features such as six-way conference calling. Pitts Decl. ¶ 24.

The feature port additive rate is not the only aspect of BellSouth’s switching rates that is not cost based. BellSouth’s switching rates are overstated due to a number of additional TELRIC errors. Although in the *Georgia/Louisiana 271 Order*, the Commission approved BellSouth’s switching rates notwithstanding these defects, the Commission should re-examine these switching cost issues here, particularly in light of BellSouth’s obviously non-compliant features port-additive rate. For example, in the *Georgia/Louisiana 271 Order*, the Commission rejected AT&T’s argument that all new switches should be used in determining the appropriate switch discount. *Georgia/Louisiana 271 Order* ¶¶ 78-82. In developing appropriate discounts for use in its switching models, BellSouth used a sample of recent switch purchases that yielded prices that exceeded the contract price, an impossible result given the significant discounting of switching equipment. Pitts Decl. ¶ 6. Second, BellSouth developed skewed percentages of new switch investment compared to growth switch investment by using the 1999-2002 for its sample period. As BellSouth was seeking to determine the relative new and growth investment in switches over the life of the switch, use of this period was inappropriate because BellSouth by that time had largely replaced its analog switches and as a result was making few new switch purchases. Correcting for BellSouth’s various methodological errors, the appropriate switch discount assumption is that 80 percent of the switch investment should be determined using the

new switch discount and 20 percent of switch investment should be determined using the growth percentage, rather than the [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percentages used by BellSouth. Pitts Decl. ¶¶ 7-8.

BellSouth's switching costs are also inflated by its erroneous assumption that all end office switches are combination local/tandem switches. BellSouth is assuming that it has no switches that perform only local end-office functions or only tandem functions. This assumption is demonstrably inconsistent with BellSouth's actual network (as demonstrated by the Local Exchange Routing Guide or "LERG"), and overstates tandem switch costs by failing to reflect accurately switch discounts for tandem switch investment. The study also understates the higher utilization levels associated with combination local/tandem switches, and this understated utilization leads to increased costs per-processor-millisecond and inflated end-office and tandem minute-of-use and feature rate charges.²⁰ Pitts Decl. ¶ 10.

Finally, BellSouth misallocates the "getting started" costs to the minute-of-use and feature port additive rate elements. These "getting started" costs are fixed and largely associated with maintenance, administrative, test, and spare equipment, memory, and other common equipment in the switch. Such "getting started" costs do not vary with respect to the number of lines or switch usage. BellSouth has very low switch-processor utilization, which means that BellSouth's switch processors will not exhaust on calls. As a result, additional calls do not cause additional switch-processing costs. The "getting started" costs should be recovered in the fixed

²⁰ A similar equipment problem with BellSouth's cost study is its reliance on outdated trunk equipment technology rather than the more efficient and cost effective SONET components that are universally recognized as the forward-looking trunking technology. Pitts Decl. ¶ 9.

port charges, and BellSouth's allocation of these costs to the minute-of-use and feature port additive charges violates TELRIC's cost-causation principles.²¹ Pitts Decl. ¶¶ 11-16.

In light of these various clear TELRIC errors, BellSouth's switching rates may not be found to be in compliance with Checklist Item Two.

C. BellSouth's UNE Rates For Loops And Switches In North Carolina Are Not TELRIC-Compliant Because They Are Based On Old Data That Do Not Reflect Current Technologies And Economies Of Scale

BellSouth's UNE rates in North Carolina for loops and switching violate TELRIC requirements. The data on which these rates are based are out-of-date and do not reflect BellSouth's current costs. Those costs have greatly declined, both because of recent technological developments and because the substantial growth in demand in recent years has increased BellSouth's economies of scale, scope, and density. Lieberman Decl. ¶ 6. Indeed, this Commission has noted that "technological developments are reducing the costs incurred by carriers in handling all sorts of traffic," and that the efficiencies of "new system architectures" apply to both voice and data traffic.²² By contrast, BellSouth's UNE rates for loops and switching are based upon 1996 data, and do not reflect the tremendous reductions in forward-

²¹ Similarly, BellSouth mistakenly treats the Lucent 5ESS Equivalent POTS half call ("EPHC") cost as traffic sensitive. EPHC costs should be recovered in the fixed port rate element. Pitts Decl. ¶ 14.

²² Order on Remand and Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP Bound Traffic, CC Dockets No. 96-98 and 99068, FCC 01-0131, ¶ 84, 93, (citing Letter from David J. Hostetter, SBC, to Magalie Roman Salas, Secretary, FCC (Feb. 14, 2001), Attachment (citing September 2000 Morgan Stanley Dean Witter report that discusses utilization of lower cost switch technology); Donny Jackson, "One Giant Leap for Telecom Kind?," Telephony, Feb. 12, 2001, at 38 (discussing cost savings associated with replacing circuit switches with packet switches); Letter from Gary L. Phillips, SBC, to Magalie Roman Salas, Secretary, FCC (Feb. 16, 2001) (attaching press release from Focal Communications announcing planned deployment of next-generation switching technology "at a fraction of the cost of traditional equipment").

looking costs that have resulted from technological change and increased demand over the last six years. Lieberman Decl. ¶ 6.

For example, BellSouth has been able to take advantage over the past six years of substantial efficiencies in its cable and wire investment per line, but the out-of-date cost studies that underlie its UNE rates do reflect those efficiencies. As shown in the Declaration of Michael Lieberman, BellSouth's net investment per line for cable and wire facilities dropped 44% between 1996 and 2001, reflecting substantial cost reductions for all-copper loops.²³ Lieberman Decl. ¶ 7. BellSouth's net investment per line for cable, wire, and circuit equipment dropped 38% over the same period, reflecting similarly substantial cost reductions for loops served by digital loop carrier ("DLC").²⁴ *Id.* Finally, BellSouth's net investment per dial equipment minute ("DEM") for switching equipment dropped 31% for the period, reflecting substantial cost-reductions in switching functionality. *Id.* Because demand growth and technological developments have led to substantial efficiencies and reduced net investment per unit of demand, BellSouth's out-of-date data and cost studies cannot be a basis for demonstrating TELRIC compliance.

North Carolina UNE rates based on BellSouth's flawed cost-studies and stale data cannot be salvaged by reference to rates in Georgia or Louisiana. BellSouth has not provided any benchmarking analysis to support its claim that North Carolina rates satisfy the TELRIC

²³ As noted in the Lieberman Declaration (¶ 7 n.5), the FCC's ARMIS data for "cable and wire facilities" (ARMIS account 2410) actually includes the bulk of assets associated with non-DLC loops, including investment in poles and associated labor and materials, aerial cables, underground cable, buried cable, intrabuilding network cable, and conduit systems (ARMIS accounts 2411, 2421-2423, 2426, and 2441).

²⁴ DLC and other multiplexing equipment is included in circuit equipment (ARMIS account 2232), which together with the cable and wire facilities accounts include virtually all the assets associated with DLC loops. Lieberman Decl. ¶ 7 n.5.

benchmark when compared to Georgia rates.²⁵ Indeed, AT&T's benchmarking analysis demonstrates that the North Carolina rates fail to meet the Commission's benchmarking test. Lieberman Decl. ¶ 10. On a cost-adjusted basis, BellSouth's UNE-L loop rates for North Carolina exceed those in Georgia by 11% and those in Louisiana by 6%. *Id.* ¶ 11. BellSouth has not and cannot account for these differences, and therefore has not demonstrated TELRIC compliance for its North Carolina rates.

D. BellSouth's UNE Rates Create A Discriminatory "Price Squeeze" In Violation Of Checklist Item Two.

That BellSouth has set discriminatory UNE rates in North Carolina is independently confirmed by additional evidence that these UNE rates, when considered with available revenues, are too high to permit competitive UNE-based residential entry in North Carolina. Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, IntraLATA toll contributions, and state and federal universal service revenues – the available revenues are not sufficient to cover an efficient new entrant's costs in North Carolina. Moreover, even accounting for possible entry strategies that include a mix of UNE-based services and resale service, the margins available to new entrants are insufficient to support competitive local telephone entry. Thus, BellSouth's UNE rates in North Carolina are discriminatory in violation of Checklist Item Two.²⁶

²⁵ Of course, five year-old rates themselves do not reflect substantial increases in demand and declines in the cost of switching equipment since the rates went into effect, and thus cannot be presumed to be TELRIC-compliant. Lieberman Decl. ¶ 9 n.7. Thus, had BellSouth actually performed a "cost-adjusted" rate calculation, it still could not demonstrate TELRIC compliance. *Id.*

²⁶ As demonstrated below, the fact that BellSouth's UNE rates in these states preclude competitive local entry also shows that a grant of BellSouth's applications would contravene the public interest.

Section 271 bars the Commission from granting BellSouth long distance authority unless the Commission finds that the UNE rates are “nondiscriminatory” as well as cost-based. *See* 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A). The Supreme Court has held that even if a utility’s wholesale rates are within the range of reasonable cost-based rates, the rates are “discriminatory” and “anticompetitive” if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the utility’s retail services to any class of customers. *FPC v. Conway Corp.*, 426 U.S. 271, 278-79 (1976). Thus, if BellSouth’s high-end UNE rates foreclose UNE purchasers from economically providing residential competition, BellSouth is engaged in “discrimination” and has not satisfied Checklist Item Two. And because Section 271 categorically bars long distance authorization unless Checklist Item Two has been “fully implemented,” to the extent that BellSouth’s UNE rates in any state are discriminatory, the Application must be denied.

The Commission recently offered guidance on the type of “margin analysis” that should be employed to test whether a BOC’s rates are, in fact, discriminatory. The Commission explained that, in addition to the revenues that are directly available due to local entry, several other revenue sources would be relevant to a price squeeze analysis. These revenue sources include intraLATA toll and interLATA toll revenue contributions, and the amount of federal and state universal service revenues that would be available to new entrants. *See, e.g., Vermont 271 Order* ¶ 71. The Commission also stated that a margin analysis should consider whether entry is viable by offering a mix of a UNE-based and resale-based local services. *See id.* ¶ 69.

AT&T has conducted such an analysis. *See* Lieberman Decl. ¶¶ 19-31; Bickley Decl. ¶¶ 2-11. It demonstrates that a residential entry strategy that employs a combination of UNE-based and facilities-based entry (the analysis assumes a UNE-based approach where that is the

most profitable entry mode, and a resale-based approach where that is the most profitable mode of entry) is *not* economically feasible in North Carolina. State-wide average *gross* margins (not accounting for carriers' internal costs) in that state are only \$3.76, which does not even come close to covering an efficient carrier's internal costs of entry. Lieberman Decl. ¶ 29. As demonstrated in the attached declaration of Stephen Bickley, an efficient new entrant's forward-looking internal costs exceed \$10.00 in North Carolina.²⁷ After accounting for these internal costs of entry, the *net* margins that are available to new entrants in North Carolina are *negative*. Lieberman Decl. ¶¶ 30-31. This analysis, which shows that UNE-based competitive entry is not feasible in North Carolina, confirms that BellSouth's UNE rates in North Carolina are discriminatory in violation of Checklist Item Two.

v. BELLSOUTH HAS FAILED TO DEMONSTRATE THAT IT AND ITS SECTION 272 AFFILIATE WILL OPERATE IN ACCORDANCE WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY.

"As a pre-condition to entry under section 271,"²⁸ BellSouth and its section 272 affiliate must present evidence, not "paper promises," that establishes they will comply "with the requirements of section 272." 47 U.S.C. § 271(d)(3)(B); *Michigan 271 Order* ¶ 55 (holding that "paper promises" cannot satisfy the BOC's burden under § 271). As the Commission has frequently stressed, "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that

²⁷ In the past, the Commission has questioned whether the well-known internal cost estimate is that of an efficient carrier. The answer to that question is yes. As explained by Mr. Bickley, that internal cost figure does not reflect carriers' *current* internal costs, but their forward-looking costs that accounts for future savings associated with efficiencies and increased scale. See Bickley Decl. ¶¶ 2-11.

²⁸ Non-Accounting Safeguards Third Order On Reconsideration ¶ 2.

BOCs compete on a level playing field.” *Texas 271 Order* ¶ 395 (quoting *Michigan 271 Order* ¶ 346).

Section 272(c)(1) “requires that a BOC in its dealings with its section 272 affiliate ‘may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.’” *Second Louisiana 271 Order* ¶ 341 (quoting § 272(c)(1)). Section 272(e)(3) further requires “that a BOC must make volume and term discounts available on a nondiscriminatory basis to all unaffiliated interexchange carriers.” *Non-Accounting Safeguards Order* ¶ 257. BellSouth has not demonstrated compliance with these nondiscrimination requirements.

BellSouth contradicts its claims that it will comply with Section 272 by affirmatively seeking to establish throughout its region interstate and intrastate switched access tariffs that unlawfully discriminate in favor of its long-distance affiliate, BellSouth Long Distance, Inc. (“BSLD”), in violation of the non-discrimination requirements of Section 272. The BellSouth SWA Contract Tariff, which BellSouth submitted to the Commission and each state in its service territory, is structured to provide impermissible “growth” discounts that are designed to allow BSLD to pay lower rates per minute-of-use than will larger, established carriers such as AT&T. As BellSouth has admitted in its state filings, these tariffs are designed to provide “discounts based upon positive incremental local switching usage,”²⁹ that is, discounts are based on growth in local switch usage. Such “growth” discounts have been explicitly prohibited by the Commission as a violation of Section 272(c)(1) and 272(e)(3), because they plainly would discriminate in favor of a BOC’s long-distance affiliate and against established IXC’s, which are

²⁹ Letter from C. D. Hatchcock, Regulatory & External Affairs Vice President, BellSouth Telecommunications, Inc. to N. Carpenter, Director, Communications Division, Public Staff, N.C. Utilities Comm., at 2 (May 23, 2002) (“Hatchcock Letter”).

experiencing declines in access minutes, and will inevitably continue to experience further declines after a BOC's entry into long distance. The fact that BellSouth has filed such clearly unlawful, discriminatory tariffs virtually simultaneously with this joint application precludes any finding that BellSouth has met its obligation to demonstrate that it will comply with Section 272 if granted interLATA authority.

A. Section 272(c)(1) Imposes An “Unqualified Prohibition” Against All Forms Of Discrimination By A BOC In Favor Of Its Affiliate.

Section 272(c)(1) imposes an “unqualified prohibition” against all forms of discrimination by a BOC in favor of its affiliate, and section 272(e)(3) “requires that a BOC must make volume and term discounts available on a nondiscriminatory basis to all unaffiliated interexchange carriers.” *Non-Accounting Safeguards Order* ¶¶ 197, 257. As the Commission has stressed, “[T]he section 272(c)(1) nondiscrimination provision is designed to provide the BOC an incentive to provide efficient service to rivals of its section 272 affiliate, by requiring that potential competitors do not receive less favorable prices or terms, or less advantageous services from the BOC than its separate affiliate receives.” *Non-Accounting Safeguards Order* ¶ 206.

One of the most direct and harmful ways a BOC can discriminate against IXC's and in favor of its section 272 affiliate is by offering its affiliate preferential rates. If a BOC is allowed to charge competitors higher prices for inputs than it charges its own 272 affiliate, “the BOC could create a ‘price squeeze’ ... [that] may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer.” *Non-Accounting Safeguards Order* ¶ 12. Pursuant to the “unqualified prohibition against discrimination” established by section 272(c)(1), *id.* ¶ 197, the Commission has mandated that “[a] BOC must provide to unaffiliated entities the same goods, services, facilities, and

information that it provides to its section 272 affiliate at the same rates, terms, and conditions.” *Id.* ¶ 202. The Commission specifically concluded that section 272(e)(3) expressly “require[s] the BOCs to charge nondiscriminatory prices” for telephone exchange service and exchange access, *id.* ¶ 258, and that “a BOC must make volume and term discounts available on a nondiscriminatory basis to all unaffiliated interexchange carriers.” *Id.* ¶ 257.

The Commission has given special attention to schemes by which a BOC may be able to establish rates that appear to be facially neutral, but in fact have an unlawful, discriminatory impact. In the *Non-Accounting Safeguards Order*, the Commission recognized that “a BOC may have an incentive to offer tariffs that, while available on a nondiscriminatory basis, are in fact tailored to its affiliate’s specific size, expansion plans, or other needs.” *Id.* ¶ 257. The Commission specifically noted that growth discounts, which offer reduced prices based on growth in local traffic, “create an artificial advantage for BOC long distance affiliates with no subscribers, relative to existing IXC’s and other new entrants.” *See Access Charge Reform NPRM* ¶ 134.

The Commission has also recognized that BOC affiliates, which “will begin with existing relationships with end users, name recognition, and no subscribers,” will be able to “grow much more quickly than existing IXC’s and other new entrants.” *Non-Accounting Safeguards Order* ¶ 192. It has further recognized that “incumbent LECs could circumvent the nondiscrimination provisions of section 272 by offering growth discounts for which, as a practical matter, only their affiliates would qualify.” *Id.* In light of this risk, and finding that growth discounts offered no “affirmative benefit” to the development of competitive access markets, the Commission expressly prohibited the use of growth discounts in interstate switched access service tariffs. *Access Charge Reform NPRM* ¶ 135.

B. BellSouth's Switched Access Tariff Seeks To Establish Impermissible Growth Discounts Which Would Discriminate In Favor Of BellSouth's Long Distance Affiliate.

Though expressly prohibited by the Commission, BellSouth's proposed SWA Contract Tariff would establish a discriminatory growth discount that would favor BSLD over large, established IXC's such as AT&T. BellSouth's SWA Contract Tariff, which offers discounts based on percentage growth from a fixed customer base, has a discriminatory impact on established IXC's because they start from a large customer base, from which it is difficult to grow annually on a high percentage basis. *See* King Decl. ¶ 12. Indeed, the customer base of large IXC's is likely to shrink as BSLD enters into the long distance market in various BellSouth service territory states. *Id.* Similarly, the gradual expansion of local competition in the BellSouth service territory will mean that, for an increasingly substantial number of calls, a CLEC -- not BellSouth -- will be the originating and/or terminating carrier, and established IXC's will owe access charges to various CLECs rather than to BellSouth. *Id.* BSLD, on the other hand, will begin with a very small customer base. As BSLD enters the interLATA market, however, it will be able to leverage BellSouth's monopoly customer base into a large share of the long distance market, mostly at the expense of the large IXC's. *Id.* Thus, even though AT&T's total access minutes may be significantly larger than those of BSLD, BSLD will be able to show "growth" in its initially small volumes, and on that basis obtain a larger volume discount and lower access charges than AT&T and other large IXC's. *Id.* ¶ 6.

BellSouth's growth-discount scheme is contained in its BellSouth SWA Contract Tariff filed with the Commission,³⁰ and is repeated in BellSouth's filings in all its service territory states, including the five states that are the subject of this Application.³¹

³⁰ BellSouth Telecommunications, Inc. F.C.C. Tariff No. 1, Section 26, BellSouth SWA Contract Tariff, Original Page 26-1 et seq. (eff. May 18, 2002) ("BellSouth FCC Tariff").

Under the terms of the federal tariff, effective in the 8 MSAs³² in which BellSouth has pricing flexibility pursuant to Part 69, Subpart H, of the Commission's rules, BellSouth is making available volume discounts to carriers that agree to execute a multi-year contract. In its explanation accompanying the filing, BellSouth describes its SWA Contract Tariff as a "volume and term plan" discount, but the increasing volume requirements make clear that the SWA Contract Tariff is a "growth" tariff. For example, these "volume discounts" are available over a five-year contract period for annual growth in switching usage compared to a specified minimum level.³³ King Decl. ¶ 3. To receive the discount, a carrier must achieve growth each year over the minimum level, and the discount is applied only to revenues that exceed the revenues associated with the stated minimum. *Id.* In the first year, a 7% discount is available for usage in excess of the stated minimum, a 10% discount is given for growth of 2-10% over the stated

³¹ BellSouth Telecommunications, Inc. – Alabama, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff AL2002-01, eff. June 17, 2002; BellSouth Telecommunications, Inc. – Kentucky, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff KY2002-01, eff. June 28, 2002; BellSouth Telecommunications, Inc. – Mississippi, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff MS2002-01, eff. June 14, 2002; BellSouth Telecommunications, Inc. – North Carolina, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff NC2002-01, issued May 23, 2002 (pending); BellSouth Telecommunications, Inc. – South Carolina, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff SC2002-01, eff. June 26, 2002. The other BellSouth SWA Contract Tariff filings include Florida (BellSouth Telecommunications, Inc. – Florida, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff FL2002-01, eff. June 17, 2002), Georgia (BellSouth Telecommunications, Inc. – Georgia, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff GA2002-01, filed June 6, 2002), Louisiana (BellSouth Telecommunications, Inc. – Louisiana, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff LA2002-01, eff. June 20, 2002), and Tennessee (BellSouth Telecommunications, Inc. – Tennessee, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff TN2002-01, eff. June 28, 2002).

³² Those eight MSAs are Montgomery, AL; Jacksonville, Miami/Ft. Lauderdale/Hollywood, Orlando, and Panama City, FL; Atlanta and Columbus, GA; and LaFayette, LA.

³³ This specified minimum level is the carrier's projected local switching minutes for the first year of the contract based on the trend of the most recent 18 months' local switching usage prior to the beginning of the contract. King Decl. ¶ 3.

minimum level, and a 15% discount is available for if growth exceeds 10% of the stated minimum. In the second and third years, a carrier must achieve at least 2% growth over the stated minimum to receive a discount, and in the fourth and fifth years, 10% growth is required to receive a discount. *See* BellSouth FCC Tariff, Section 26, BellSouth SWA Contract Tariff, Original Page 26-5. The discounts increase to a maximum of 35% for more than 10% growth over the stated minimum in the fifth year of the contract. *Id.*

In its North Carolina filing, BellSouth is more candid about the purpose of the SWA Contract Tariff. There, BellSouth admits that it provides “discounts based upon positive incremental local switching usage.” Hatchcock Letter, 2. Once AT&T realized the true effect of this tariff, it filed a complaint against BellSouth in North Carolina on the grounds that the BellSouth SWA Contract Tariff is discriminatory and anticompetitive.³⁴ King Decl. ¶ 5. In response, the North Carolina Utilities Commission has suspended the tariff until August 12, 2002, and ordered a further investigation.³⁵ In all other BellSouth states that are the subject of this Application, the BellSouth SWA Contract Tariff has become effective, though AT&T will be challenging the tariff in other BellSouth states.

³⁴ Complaint for Anticompetitive Activity Pursuant to N.C.G.S. 62-73; 62-133.5(a)(iii) and (iv); 62-133.5(d) and (e); and 62-134; and Commission Rule R1-9 and Motion to find Tariff Noncompliant or Suspend Tariff for Failure to Comply with N.C.G.S. 133.5(a)(iii) and (iv); 62-133.5(a) and (e) and Commission Tariff Rule R9-4, *In the Matter of BellSouth Telecommunications, Inc. Intrastate Access Services Tariff/New Section 26/BellSouth SWA Contract Tariffs*, Docket No. P-100, Sub 30, Docket No. P-55, Sub 1365 (N.C. Util. Commn.).

³⁵ Order Suspending Tariff and Seeking Further Comments, *In the Matter of Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements*, Docket No. P-55, Sub 1365 (N.C. Util. Comm’n).

Once its true nature as a growth discount scheme is revealed, the tariff is indefensible.³⁶ It serves only to give an advantage to entities such as BSLD that are growing, as opposed to larger, more established carriers such as AT&T that are experiencing declining usage and are unlikely to be able to increase their traffic to qualify for a discount.³⁷ As a result of the discriminatory design of BellSouth's SWA Contract Tariff and the skewed discounts it provides, BSLD customers will have lower per-minute switched-access rates than AT&T customers with the same amount of traffic, even though AT&T will have much larger total volumes. While discounts based on absolute volumes may reasonably reflect the economies of scale, there is no justifiable basis for a rate discount based on relative volume growth, particular where, as here, the low base of the BellSouth affiliate makes significant growth percentages possible even when absolute volume growth is insignificant and provides no economies to BellSouth. *Id.* ¶ 7.

³⁶ A similar scheme has already been rejected by at least one state commission. In 1999, Southwestern Bell Telephone Company ("SWBT") filed a "growth" tariff for intrastate switched access service that provided a discount for each 10% increase in annual MOUs, but the Texas Commission revoked the tariff for being "discriminatory and anticompetitive." *See Order, Complaint by AT&T Communications of the Southwest, Inc. Regarding Tariff Control Number 21302—Switched Access Optional Payment Plan (OPP)*, Docket No. 21392 (SOAH Docket No. 473-99-1963) (Texas PUC March 1, 2000). ("*Texas Growth Tariff Order*"). The Texas Commission recognized that, once SWBT received Section 271 authorization, it would capture a "significant share" of the interLATA long-distance traffic, with a corresponding decline in the share held by existing IXC's, which would make it "impossible for [existing IXC's] to achieve the maximum discounts" under the proposed tariffs. *Id.* at 6. On that basis, the Texas Commission determined that the tariffs were "discriminatory and anticompetitive because [the] highest discount is not functionally available to all IXC's." *Id.* at 8. The Texas Commission's reasoning applies equally to BellSouth's SWA Contract Tariff.

³⁷ The tariff also discriminates by restricting the rights of IXC's to cancel the Contract in response to other offerings by BellSouth. Under the tariff, an IXC can cancel the contract only once, on the anniversary date of the contract, to subscribe to another contract tariff. BellSouth FCC Tariff, Section 26.1.2(I). A similar provision appears in each state tariff. This restriction will allow BellSouth to make improved offers to its BSLD affiliate that cannot be adopted by IXC's that have already changed their contract once, resulting in blatantly discriminatory terms.

Such unlawful conduct -- which has continued even after BellSouth filed the instant application -- is the “best indicator” (*Michigan 271 Order* ¶ 347) of how BellSouth can be expected to behave should it obtain interLATA authority in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, all states in which it has filed the discriminatory BellSouth SWA Contract Tariff. BellSouth’s bald-faced disregard of the clear terms of sections 272(c)(1) and 272(e)(3) and of the Commission’s orders compels the conclusion that BellSouth has not satisfied the requirements of 47 U.S.C. § 271(d)(3)(B) and that accordingly the joint Application should be denied.

VI. BELLSOUTH’S ENTRY INTO THE INTERLATA MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST.

Even if the Commission could find that BellSouth had fully implemented its obligations under the competitive checklist, and demonstrated compliance with Section 272, the record here precludes any finding that granting BellSouth’s application is consistent with the public interest. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, the local market is in fact fully and irreversibly open to competition. Because the Commission cannot make this determination in BellSouth’s five states, a grant of section 271 authority is premature and wholly at odds with the fundamental premise of the Act.

A. InterLATA Authorization Is Not In The Public Interest Unless BellSouth’s Local Markets Are Irreversibly Open To Competition.

In BellSouth’s view (Br. 137-38), the Commission should virtually presume that the public interest will be served by granting BellSouth’s application, because (in BellSouth’s view) BellSouth has met its checklist obligations and approval of its application will spur competitors to enter the local market. Any such presumption, however, would conflict directly with the plain language of Section 271, which puts the burden on the applicant to show that its entry would be

“consistent with the public interest.” The Commission has flatly rejected the argument that the public interest test can be satisfied simply by presuming that the benefits of long-distance entry will outweigh competitive harms from premature authorization.³⁸

In fact, the absence of any meaningful local competition is itself a compelling reason to reject an application as inconsistent with the public interest. *See Sprint v. FCC*, 274 F.3d 549 (D.C. Cir. 2001). The lesson from experience in other states, such as Texas, is clear: allowing an incumbent LEC to provide interLATA services before local markets are open will not spur successful local competition.³⁹ If CLECs cannot profitably offer local residential service to customers, they cannot and will not effectively compete in local markets, regardless of whether the incumbent has obtained long-distance authorization.⁴⁰

³⁸ *See Michigan 271 Order* ¶ 43 (“Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied”); ¶ 388 (“As we have previously observed, ‘the entry of the BOC interLATA affiliates into the provision of interLATA services has the potential to increase price competition and lead to innovative new services and marketing efficiencies.’ Section 271, however, embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.”)

³⁹ Although BellSouth boasts (Br. at 140-41) of competition currently being provided by Texas CLECs, the January 2001 *TPUC Report* on the “Scope of Competition in Telecommunications Markets of Texas” reveals that “monopoly power exists . . . in residential and rural markets in Texas” (*id.* at 83; *see* xiii) and severe financial problems have caused both large and small CLECs to reduce or eliminate their residential service in Texas (*id.* at 55-58, 80-81). The Report also reveals that the lack of competition has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and to *raise* its prices for local services to both residential and business customers. *Id.* at x, 62-64, 79, 81). In sum, the TPUC concludes: “By the end of 2000, SWBT’s financial position had strengthened relative to the CLECs. *SWBT’s entry into the long distance market has weakened the ability of CLECs to challenge SWBT in local voice service.* *Id.* at 81 (emphasis added). ”

⁴⁰ Emboldened by its ability to market bundles of local and long distance services without any competition, in February, 2001, SWBT *raised* its residential long distance rates in Texas by 10 to 33 percent, *increased* its basic rates for long-distance service by more than 10 percent, and *also*

Accordingly, as the Commission has recognized, granting BellSouth's request for long distance authority can serve the public interest only if the Commission finds that the BOC's "local market is open to competition and will remain so." See *Texas 271 Order* ¶ 431. In order to determine whether the BOC's local telecommunications markets are in fact open to competition, the Commission first reviews the extent to which new entrants "are actually offering" local service to both business and residential customers through each of the three means offered by the Act. *Michigan 271 Order* ¶ 391. Second, where local competition is not securely established, the Commission determines whether this reflects the continuing presence of entry barriers and BOC misconduct, or is attributable instead solely to the business decisions of potential new entrants.

B. BellSouth Maintains Monopoly Power Over Residential Service.

The "Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale," (*id.* ¶ 96). Congress "sought to ensure that all procompetitive entry strategies are available." *Id.* ¶ 387. As the Commission has recognized, its "public interest analysis of a section 271 application, consequently, *must* include an assessment of whether all procompetitive entry strategies are available to new entrants." *Id.* (emphasis added). And, as the Commission explained in the *Michigan 271 Order*, "[t]he most probative evidence that all entry strategies are available would be that new entrants *are actually offering* competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some

increased the "discounted rate" for customers who buy other services from SWBT by 33 percent. "SWBT Raises Nonlocal Call Rates: Company Says Prices Better Reflect Costs," *The Dallas Morning News*, February 2, 2001.

combination thereof) in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).” *Id.* ¶ 391 (emphasis added). In subsequent applications, the Commission has repeatedly considered the degree to which competitors have actually succeeded in offering local telecommunications services using the different entry strategies prescribed by the Act. *See, e.g., New York 271 Order* ¶¶ 13-14; *Texas 271 Order* ¶¶ 5-6.

There can be little doubt that BellSouth retains monopoly control, particularly over residential local service, in each of the five states under review here. This continuing control was made starkly apparent in the weeks immediately following the filing of this joint application, when the Consumer Advocate for South Carolina filed a complaint challenging the substantial increases in the price for local services for business and residential customers that BellSouth recently filed. “The Consumer Advocate’s position is that the proposed price increases . . . represent an abuse of market position on the part of BellSouth.”⁴¹ Notably, the prices increases “have nothing to do with the cost of these services.” *Id.* Rather, they reflect the harsh reality “that there is a lack of competitive alternative to control BellSouth’s pricing behavior.” *Id.* As the Consumer Advocate correctly recognized, “[i]n a truly competitive market, [BellSouth] would be unable to sustain such price increases without the loss of significant business.” *Id.* BellSouth is obviously confident – as this Commission should also be – that BellSouth today, and in the immediate future, faces no significant competitive threat whatsoever to its monopoly control of any of its local markets in these five states.

⁴¹*Philip S. Porter, Consumer Advocate for the State of South Carolina v. BellSouth Telecommunications, Inc.*, (S.C. PSC Tariff No. 2002-221) Complaint at ¶ 4 (filed July 5, 2002) (attached hereto as Ex. 1).

Indeed, the very data that BellSouth has submitted to the Commission confirm that competitors have not yet been able significantly and irreversibly to enter BellSouth's local residential markets. Those data show that BellSouth maintains a monopoly over residential service in its Alabama, Kentucky, Mississippi, North Carolina and South Carolina service territories. Using the E911 and UNE-P data presented by BellSouth witness Elizabeth Stockdale, Attachment 3 (consisting of Tables 1-10) shows the amount of CLEC competition BellSouth claims to exist in these five states.⁴² Tables 2, 4, 6, 8 and 10 show that, in each of the five states, approximately 1% or less of the residential lines in BellSouth's service territories are served by facilities-based competitors (with a mere 250 lines, or less than 1/10 of 1% of the residential lines in BellSouth's Mississippi service territory, served by facilities-based competitors). Similarly, these same tables demonstrate that, in four of the five states, ½ of 1% or less of residential lines in BellSouth's service territories are served by UNE-based competitors (the exception being Mississippi, where 2.4% of residential lines are served by UNE-based CLECs).

Moreover, BellSouth's data *overestimate* the amount of CLEC facilities-based competition for average consumers, including both residential and small business customers. Gillan Decl. ¶¶ 18-27 (attached to Comments of AT&T Corp., CC Docket No. 01-277 (Oct. 22, 2001) (Ex. 2). Significantly, BellSouth ignores the most direct measure available to evaluate

⁴² According to the Tables (Attachment 2 hereto): In Alabama, facilities-based CLECs have 6.6% and 1.1%, UNE-based CLECs have 2.6% and 0.3%, and resale CLECs have 2.0% and 2.6% of the total and residential lines, respectively. In Kentucky, facilities-based CLECs have 3.2% and 1.0%, UNE-based CLECs have 1.9% and 0.5%, and resale CLECs have 2.2% and 2.5% of the total and residential lines. In Mississippi, facilities-based CLECs have 1.6% and 0.0%, UNE-based CLECs have 3.5% and 2.4%, and resale CLECs have 2.8% and 3.1% of the total and residential lines. In North Carolina, facilities-based CLECs have 9.3% and 1.1%, UNE-based CLECs have 1.8% and 0.5%, and resale CLECs have 1.8% and 2.0% of the total and residential lines. In South Carolina, facilities-based CLECs have 5.7% and 0.5%, UNE-based CLECs have 2.1% and 0.2%, and resale CLECs have 3.0% and 3.8% of the total and residential lines.

such facilities-based competition – *i.e.*, the traffic on the interconnection facilities between BellSouth and CLEC networks as measured by minutes of use. This measure is particularly useful, because it provides insight not only into the competitive *penetration* achieved by facilities-based entrants, but also into the *types* of consumers such competitors have attracted. Strikingly, throughout the BellSouth territory, CLECs’ *terminating* minutes of use constitute 84 to 95 percent of CLECs’ total traffic in each BellSouth state. *Id.* Table 4. The likely explanation for this phenomenon is that the vast bulk of CLEC traffic is for Internet Service Providers (ISPs) – *not* for the conventional customers who represent the core of BellSouth’s local monopoly. *Id.*

¶ 21. When ISP lines are eliminated, the number of facilities-based lines served by BellSouth is reduced significantly. *Id.* Table 6. In addition, as the table set forth in Attachment 4 hereto shows, many of the facilities-based CLECs that BellSouth identifies as its competitors in the five states (Br. at 21-23), have gone, or are going, out-of-business, or are otherwise in financial distress.

The prospects for increased UNE-based competition are also bleak. If BellSouth actually offered CLECs non-discriminatory access to the full economies of scale in its existing network, the Commission should see meaningful entry by and increasing competition from UNE-based entrants. Yet, since the passage of the Act, all CLECs combined have managed to serve only trivial numbers of UNE-based residential lines – ½ of 1% or less in four of the five states.

Notably, the bulk of the residential “competition” in the five states is resale. This is an inherently limited competitive vehicle, both because resale-based competitors cannot alter the nature of the service they are reselling (and thus cannot provide consumers with innovative or improved services), and because resale is priced in a manner that precludes its use in all but the

most selectively chosen circumstances.⁴³ The record thus shows that resale is not a growing, viable source of future competition for BellSouth in the five states, and that no entrant has yet succeeded in using either UNEs or facilities to offer competitive local residential service on any meaningful scale.

C. BellSouth’s Local Residential Markets Remain Closed To UNE- and Facilities-Based Competition Due To Entry Barriers And BellSouth’s Own Actions.

Because the relevant data show a lack of meaningful local competition, the Commission must next determine “whether the lack of competitive entry is due to the BOC’s failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason.” *Michigan 271 Order* ¶ 391. To make this determination, the Commission should consider all “relevant factors” that might “frustrate congressional intent that markets be open [to competition].” *Kansas/Oklahoma 271 Order* ¶ 267.

A review of the evidence discussed above makes clear that entry barriers and BellSouth’s own actions have helped perpetuate BellSouth’s monopoly over residential service in the five states. BellSouth has yet to fully implement its obligations with respect to providing competitors nondiscriminatory access to OSS, to other UNEs, and to interconnection. BellSouth has failed to establish reliable performance measures and an effective enforcement plan, both of which are crucial both to the ability and willingness of new entrants, particularly UNE-based competitors,

⁴³ The avoided cost discount has proved inadequate to provide CLECs a basis for profitable entry for most consumers. For example, as monopolists, the incumbents do not face (and therefore do not “avoid”) the huge customer acquisition costs that CLECs confront, nor do they face the lack of economies of scale that a new entrant must address. And CLECs providing resale do not benefit from access revenue. For all of these reasons, CLECs seeking to provide a broad-based, significant competitive alternative to the incumbents’ local residential monopoly cannot do so through the resale of local service.

to incur the substantial investment required to enter a BOC's local market, and to the continuing viability of competition once entry has occurred. *E.g., Michigan 271 Order* ¶¶ 393-94. BellSouth's inadequate performance measurement reporting continues to disguise its OSS deficiencies, and BellSouth's UNE rates altogether preclude UNE-based entry in North Carolina. BellSouth also continues to deter and delay competitive entry in all of its states through tactics such as non-cooperation in resolving acknowledged competitive problems – such as change control – and through deceptive practices such as the filing of discriminatory access tariffs.

In sum, the lack of facilities-based and UNE-based CLEC competition for service in the five states is due in substantial measure to BellSouth's "failure to cooperate in opening its network to competitors" and to the "existence of barriers to entry," *not* to "the business decisions of potential entrants" that are independent of these entry barriers and BellSouth's misconduct. *Michigan 271 Order* ¶ 391. Nothing suggests that potential entrants have decided that the millions of residential customers in these five states are simply not worth pursuing even though the local markets are fully open to competition, or "that competitive alternatives can flourish rapidly throughout the state." *Id.* ¶ 392. The local markets in these five states are simply not open to competition, let alone irretrievably open.

D. BellSouth's SWA Contract Tariffs Unlawfully Discriminate Against Long Distance Competitors

The Commission has recognized that no finding that "the local markets is open and will remain so" would be valid if the "BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with State and federal telecommunications regulations." *Michigan 271 Order* ¶ 397. That is because the provisions of the 1996 Act that are directed at opening the local exchange market "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such

LECs with their statutory obligations.” *Id.* BellSouth has taken patently unlawful actions that demonstrate its intention to discriminate if it is permitted to provide in-region long distance service.

As discussed above, BellSouth has submitted to the Commission and each state in its service territory its BellSouth SWA Contract Tariff that offers “growth” discounts designed to permit its long distance affiliate, BellSouth Long Distance, Inc. (“BSLD”), to pay lower rates per minute of use than larger, established carriers such as AT&T. King Decl. ¶ 2. In state filings, BellSouth has candidly acknowledged that these tariffs are designed to provide “discounts based upon positive incremental local switching usage.” *Id.* ¶ 4. Such “growth” discounts have been explicitly prohibited by the Commission, as they violate Section 272(c)(1) and 272(e)(3), and blatantly discriminate in favor of BSLD and against IXC’s that are experiencing declining access minutes. *Id.* ¶ 2. The fact that BellSouth has attempted to establish these clearly unlawful plans even as this Application is pending is compelling evidence that BellSouth cannot be relied upon to cooperate with its competitors as required by the Act.

E. BellSouth’s UNE Rates Preclude UNE-Based Entry In North Carolina.

The evidence shows that BellSouth’s UNE rates, at least in North Carolina, are so high that they preclude efficient local entry. Specifically, those rates effect a price squeeze that prevents UNE-based competitors from earning sufficient margins to provide local service economically in competition with BellSouth, by imposing wholesale costs on BellSouth’s competitors that render it impossible for them to offer a retail service that would be price competitive. *See Lieberman Decl.* ¶¶ 19-31.

As discussed above (see Part IV.D), Section 271 bars the Commission from granting BellSouth long distance authority unless the Commission finds that the UNE rates are “nondiscriminatory” as well as cost-based. *See* 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) &

(d)(3)(A). Because Section 271 categorically bars long distance authorization unless Checklist Item Two has been “fully implemented,” to the extent that BellSouth’s UNE rates in any state are discriminatory, the Application must be denied.

BellSouth’s imposition of rates that foreclose broad-based local competition not only establishes that those rates violate Checklist Item Two because they are discriminatory, but also establishes that granting the application may not fairly be found to be consistent with the “public interest.” 47 U.S.C. § 271(d)(3)(C). The Commission has held that the “public interest” prong of Section 271 requires it to “ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open.”⁴⁴ The central purpose of section 271 is to ensure that local telephone markets in any given state are open to competition – and that competing carriers therefore have the legal and economic ability to provide competing local services – before a BOC in that state is permitted to provide long-distance services. A price squeeze that would foreclose efficient local entry into the residential market obviously constitutes such a “relevant factor.” And proof that such a factor in fact exists demonstrates conclusively that the market is not – and cannot be – open.

Despite the nondiscrimination and public interest provisions of Section 271, the Commission had previously held that it need not consider evidence of a price squeeze in

⁴⁴ *Kansas/Oklahoma 271 Order* ¶ 267. The Supreme Court has explained that the statutory term “public interest” “take[s] [its] meaning from the purposes of the regulatory legislation.” *NAACP v. FPC*, 425 U.S. 662, 669 (1976). As the Commission has held, Congress adopted Section 271 in order to assure that BOCs could not provide long distance service at a time when their local monopolies would give them an “unfair advantage” over long distance competitors in, *inter alia*, providing “combined packages” of local and long distance service to customers who desire “one-stop shopping.” *AT&T v. Ameritech*, 13 F.C.C. Rcd. 21438, ¶¶ 5, 39 (1998), *aff’d sub nom. U S WEST v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999). If, by contrast, long-distance entry were allowed before other carriers could provide competing combined packages, it would “threaten competition” in both the local and the long-distance markets by granting the BOC a monopoly in the provision of such combined services. *Id.* ¶ 5.

evaluating a section 271 application. That holding was based on the Commission's view that such evidence was "irrelevant," and that considering it would improperly involve the Commission in the process of setting local retail rates that are outside its jurisdiction. *Kansas/Oklahoma 271 Order* ¶ 92. But the United States Court of Appeals for the D.C. Circuit, relying on the Supreme Court's decision in *Conway*, has now squarely rejected that view. *Sprint v. FCC*, 274 F.3d 549 (D.C. Cir. 2001). Indeed, because the central purpose of the 1996 Act is "stimulating competition," the D.C. Circuit held that the "public interest" analysis under section 271 may weigh even "*more heavily* towards addressing potential 'price squeeze'" than was required under the Federal Power Act in *Conway*.⁴⁵ Under *Sprint v. FCC*, therefore, when evidence is presented in a section 271 proceeding that UNE-based residential competition is economically infeasible, the Commission cannot grant that application without evaluating and addressing that evidence. Unless the Commission rejects this application on other grounds, it must develop and apply a framework for analyzing AT&T's claims.

In the face of *Sprint v. FCC*, the Commission, in the *Vermont 271 Order* (¶ 67), advanced three ways in which it might attempt to distinguish *Conway* as inapplicable in this context. As *Sprint v. FCC* makes clear, however, the D.C. Circuit, which reviews the Commission's section 271 decisions, has concluded that *Conway* is controlling authority here. In any event, the various potential distinctions that the Commission has raised are unfounded. The first two distinctions cited by the Commission -- that UNEs, unlike the electricity at issue in *Conway*, are

⁴⁵ *Id.* at 555 (emphasis added). Moreover, the *Sprint* Court also confirmed that the Commission's lack of jurisdiction over retail rates was no bar to such an analysis, because the Commission can respond to a price squeeze without disturbing retail rates. Instead, because the Commission has said that TELRIC rates exist within a "band," one entirely permissible solution is to "fix[] the wholesale rates, which [a]re under its jurisdiction, at a lower level within" that band. *Id.* at 554-55 (citing *Conway*, 426 U.S. at 279). Here, because, as AT&T has shown, BellSouth's North Carolina rates are not TELRIC-compliant to begin with, there is certainly plenty of room for downward movement.

not “undifferentiated commodities” and have prices that may vary by retail-customer location do not in any way blunt the force of the legal rule set forth in *Conway*: where a price squeeze is demonstrated, wholesale rates are discriminatory and contrary to the public interest. The existence of price variations (and product “differentiation”) may, of course, impact the calculations to determine *whether* a price squeeze exists (and AT&T’s margin analyses do, indeed, account for geographic rate and cost differences). But if, accounting for these rate and cost differences, a price squeeze is shown to exist, *Conway* applies with full force in this context, as the D.C. Circuit has recognized. It is also not relevant that “intentional state policy” may have caused wholesale rates to exceed retail rates. AT&T does not ask the Commission to interfere with (or even comment upon) state policy, but merely to determine whether a price squeeze exists and, if so, to decide whether it would serve the public interest to grant a section 271 application notwithstanding the price squeeze. As explained above, where local markets are not open to competition, granting section 271 authority will necessarily permit a BOC to extend its local monopoly into markets for bundled local and long distance service. The fact that “intentional state policy” may have contributed to the local monopoly does not make the leveraging of that monopoly consistent with the public interest.⁴⁶ The third purported distinction

⁴⁶ As the courts have recognized, implicit subsidies – “that is, ‘the manipulation of rates for some customers to subsidize more affordable rates for others’” – are fundamentally incompatible with efficient competition. *See Alenco Communications Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999). Accordingly, Section 254(d) expressly authorizes state commissions to adopt universal service mechanisms to convert intrastate implicit subsidies into explicit subsidies. *See* 47 U.S.C. § 254(f). To be sure, some states have chosen for policy reasons of their own to maintain the pre-existing system of implicit subsidies, and have thus far declined to establish a competitively neutral system of explicit subsidies. To the extent that those policies facilitate a price squeeze, however, Section 271 precludes the Commission from granting interLATA authority in that state. And there is no rational basis for the Commission to disregard its public interest and nondiscrimination mandates and to reward state commissions and RBOCs that choose to maintain competition-foreclosing regulation that is contrary to the terms and core competitive purposes of the 1996 Act.

cited by the Commission – the availability of resale – is also unavailing. As AT&T has repeatedly shown, and demonstrates again here, resale requirements do not solve the price squeeze because, *inter alia*, the wholesale discounts available are also too small to allow profitable entry.

Notwithstanding its reservations about the applicability of *Conway*, the Commission has also offered guidance on the type of “margin analysis” that should be employed to test whether a BOC’s rates result in an anticompetitive price squeeze. *See Vermont 271 Order* ¶ 71. The Commission has explained that, in addition to the revenues that are directly available due to local entry, several other revenue sources would be relevant to a price squeeze analysis including, intraLATA toll and interLATA toll revenue contributions, and the amount of federal and state universal service revenues that would be available to new entrants. The Commission also stated that a margin analysis should consider whether entry is viable using a mix of a UNE-based and resale-based local entry strategy. *See id.* ¶ 69.

As noted above, AT&T has conducted such an analysis, and it demonstrates that any local entry strategy along the lines described by the Commission is *not* economically feasible in North Carolina. The state-wide average *gross* margin (not accounting for carriers’ internal costs) in North Carolina is \$3.76, Lieberman Decl. ¶ 29, which does not come close to covering an efficient carrier’s internal costs of entry. Bickley Decl. ¶ 2. Because the *net* margins that are available to new entrants in North Carolina are *negative*, competitive entry is not feasible in North Carolina, and approval of BellSouth’s application is therefore not consistent with the public interest.

In an effort to respond to the D.C. Circuit’s *Sprint* decision, BellSouth raises several arguments, none of which has merit. First, BellSouth argues that its UNE-rates are compliant

with TELRIC. Ruscilli/Cox Aff. ¶ 79. As described above, in *Conway*, the Supreme Court has held that even if a utility's wholesale rates are within the range of reasonable cost-based rates, the rates are nevertheless "discriminatory" and "anticompetitive" if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the utility's retail services to any class of customers. Thus, if BellSouth's high-end UNE rates foreclose UNE purchasers from economically providing residential competition, BellSouth is engaged in "discrimination," and has not satisfied Checklist Item Two. Because Section 271 categorically bars long distance authorization unless Checklist Item Two has been "fully implemented," BellSouth's arguments about the availability of resale or other means of access are irrelevant in this context. Furthermore, because BellSouth is foreclosing competition through anticompetitive terms and conditions, that conduct also precludes any valid finding that interLATA authorization is in the public interest.

Similarly, BellSouth's reliance on the purported availability of resale to respond to evidence that its high UNE prices have doomed UNE-based competitors to failure (Ruscilli/Cox Aff. ¶ 85) is also unavailing in the public interest context. To begin with, resale is irrelevant for this purpose. The wholesale discount that has been set in North Carolina is wholly insufficient to allow any firm to cover its internal costs of service, and no firm could economically provide local exchange service in these states through resale on a broad basis over time. Most notably, a competitor that provides services using resale is not entitled to receive either USF support or access revenues. Thus, its potential revenues are significantly reduced compared to providers that employ UNE-P. This is borne out by the paltry market shares currently enjoyed by resale-based competitors in North Carolina (2.0%). *See* Table 8, *supra*.

More fundamentally, resale would be irrelevant even if the wholesale discount that has been set in North Carolina was sufficient, for resale does not give a CLEC access to the “inputs” required to provide long distance service. In particular, firms engaged in resale are entitled to use the BOCs’ facilities to provide only exchange service and not exchange access service. Resale thus has no effect on the BOCs’ monopoly over the exchange access services that originate and terminate all long distance calls, and resale therefore cannot eliminate a BOC’s ability to leverage its exchange access monopoly into the long distance market.

Nor, contrary to BellSouth’s claim (*Ruscilli/Cox Aff.* ¶ 86), is there any other entry vehicle that is available to AT&T and other CLECs in North Carolina that could allow multiple CLECs to provide residential service throughout the state. As shown above, facilities-based providers serve 1.1% of residential access lines in North Carolina. Under these circumstances, the only theoretical alternative to UNE-P would be an arrangement in which firms would attempt to provide residential service by leasing unbundled loops from BellSouth and combining them with CLECs’ switches to provide service. However, such a “UNE-L” strategy is wholly uneconomic for this purpose in these states (and elsewhere). Quite apart from the fact that carriers cannot rationally invest in switches until they have used UNE-P to build up a customer base, BellSouth and other BOCs have not deployed technology that allows customers to change from one local exchange carrier to another efficiently and effectively, in mass market quantities and at low cost. Instead, these changes require manual “hot cuts” which are expensive and which have proven impossible for BellSouth and other BOCs to administer without causing unacceptable levels of service outages even when UNE-L is used only for low volumes of orders for business customers.

Finally, the Commission's decisions in the *Vermont 271 Order* and the *Georgia/Louisiana 271 Order* on the price squeeze issues were based on the records in those proceedings. As explained above, the record concerning BellSouth's price squeeze here fully meets the standards for establishing a price squeeze that the Commission identified in the *Vermont 271 Order*.

F. BellSouth's Performance Remedy Plans Are Inadequate To Demonstrate 271 Compliance.

Equally flawed is BellSouth's assertion that its performance remedy plans in the five states included in its Application will deter future backsliding. No performance enforcement plan can be effective unless it is based upon a comprehensive set of measures which produce accurate results, and incorporates self-executing enforcement mechanisms that will effectively deter a BOC from engaging in anticompetitive conduct after Section 271 entry. The performance enforcement plans presently in place in the five states which are the subject of this joint Application cannot possibly serve as effective tools to assure future statutory compliance.

Because performance data serve as the springboard for performance-remedies payments, the unreliability of BellSouth's performance data fatally compromises the efficacy of all of the performance remedy plans that are the subject of this joint Application. However even assuming *arguendo* that BellSouth's data are accurate and trustworthy – and they certainly are not – BellSouth cannot establish that these plans will serve as effective tools to prevent future backsliding.

In this regard, the Commission has recognized that the public interest analysis set forth in Section 271(d)(3)(C) is an "independent element of the statutory checklist" that "requires an independent determination." *New York 271 Order* ¶ 423. Furthermore, the Commission has

repeatedly recognized that a factor in its public interest analysis is whether the Commission “[h]as sufficient assurance that markets will remain open after grant of the Application.” *Id.*

Although the Commission has not required an applicant to demonstrate the establishment of performance monitoring and enforcement mechanisms as a condition of Section 271 approval, it has made clear that such mechanisms could “constitute probative evidence that the BOC will continue to meet its Section 271 obligations and that its entry would be consistent with the public interest.” *Id.* ¶ 429; *see also*, *Massachusetts 271 Order* ¶ 236. To date, the Commission has not approved a Section 271 Application that did not have a performance remedy plan in place. Thus, when an applicant relies on a performance assurance plan (or “PAP”) in its Application, the Commission – as part of its “independent determination” – will review the contours of that plan to determine whether it provides a sufficient incentive for future compliance with Section 271.

As the Commission stated in the *New York 271 Order*:

Where, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue to maintain market-opening performance after receiving Section 271 authorization, *we will review the mechanisms involved to ensure that they are likely to perform as promised.* While the details of such mechanisms developed at the state level may vary widely, *we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance.*

New York 271 Order ¶ 433 (emphasis added). *See also Texas 271 Order* ¶ 423; *Kansas/Oklahoma 271 Order* ¶ 273.

Moreover, while the Commission has not specified all of the essential requirements that a particular PAP must meet in order to constitute a sufficient incentive to the BOC to comply with Section 271 in the future, it has identified certain “important characteristics” that increase the likelihood that the enforcement mechanisms in a PAP “will be effective in practice.” *New York 271 Order* ¶ 433. Thus, in the *New York 271 Order*, the Commission found that the New York

PAP would serve as an effective mechanism for ensuring statutory compliance by Verizon after it received Section 271 authorization, because it contained the following characteristics:

- potential liability that provided a “meaningful and significant incentive to comply with the designated performance standards;”
- “clearly-articulated, pre-determined measures and standards,”: which encompass a “comprehensive range of carrier-to-carrier performance;”
- “a reasonable structure designed to detect and sanction poor performance;”
- a self-executing mechanism “that does not leave the door open unreasonably to litigation and appeal;” and
- “reasonable assurances that the reported data is accurate.”

New York 271 Order ¶ 433. In its decisions reviewing subsequent Section 271 Applications, the Commission has similarly reviewed the PAP in the State at issue for these characteristics. *See, e.g., Texas 271 Order ¶¶ 424-429; Kansas/Oklahoma 271 Order ¶¶ 273-278; Massachusetts 271 Order ¶¶ 240-247.*

In its Application, BellSouth contends that the performance enforcement plans presently in place in Alabama and North Carolina satisfy all of the key criteria this Commission has deemed essential in an effective remedy plan. However, BellSouth cannot credibly rely on these performance assurance plans as a basis for approval of its Section 271 Application. In Alabama, the Georgia SEEM is in effect only on an interim basis until a permanent remedy plan is adopted after the first six-month review. *Bursh/Norris Decl. ¶ 194.* Although a remedy plan has been adopted in North Carolina, the North Carolina Utilities Commission has not yet determined the measures that will be included in the permanent performance plan. *Id. ¶ 195.* Thus, at this juncture, it is impossible for this Commission to assess whether the permanent remedy plans that are ultimately adopted in Alabama and North Carolina will encompass a “comprehensive range of carrier-to-carrier performance” or satisfy the other key characteristics that this Commission

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has deemed important in evaluating whether a performance remedy plan will ensure future statutory compliance. *New York 271 Order*, ¶ 433. Accordingly, BellSouth's reliance on the temporary remedy plans in place in Alabama and North Carolina to support its Application is misplaced.

CONCLUSION

For the foregoing reasons, BellSouth's joint application for authorization to provide in-region, interLATA services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina should be denied.

Respectfully submitted,

/s/ Mark C. Rosenblum

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4263

Mark E. Haddad
Ronald L. Steiner
SIDLEY AUSTIN BROWN & WOOD, LLP
555 West Fifth Street
Los Angeles, California 90013
(213) 896-6000

David Eppsteiner
AT&T CORP.
1200 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 810-4945

R. Merinda Wilson
Ronald S. Flagg
Alan C. Geolot
Richard E. Young
SIDLEY AUSTIN BROWN & WOOD, LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

July 11, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2002, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 11, 2002
Washington, D.C.

/s/ Peter Andros

Peter M. Andros

SERVICE LIST

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554*

Janice Myles
Wireline Competition Bureau
9300 East Hampton Drive
Capitol Heights, MD 20743

Qualex International
9300 East Hampton Drive
Capitol Heights, MD 20743

James Davis-Smith
U.S. Department of Justice
Antitrust Division
Telecommunications and Media
Enforcement Section
1401 H Street, NW, Suite 8000
Washington, D.C. 20530

John Garner
Alabama Public Service Commission
P.O. Box 304260
100 N. Union Street
RSA Union, Suite 836
Montgomery, AL 36104

Deborah Eversole
Kentucky Public Service Commission
P.O. Box 615
211 Sower Boulevard
Frankfort, KY 40602-0615

Brian U. Ray
Mississippi Public Service Commission
P.O. Box 1174
Jackson, MS 39215-1174

Robert H. Bennick, Jr.
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325

Gary E. Walsh
Public Service Commission of South
Carolina
101 Executive Center Drive
Columbia, SC 29210

Michael K. Kellogg
Sean A. Lev
Leo R. Tsao
Kellogg Huber Hansen Todd & Evans
1615 M Street, NW, Suite 400
Washington, D.C. 20036

James G. Harralson
Lisa S. Foshee
Jim O. Llewellyn
4300 BellSouth Center
675 West Peachtree Street
Atlanta, GA 30375

* Filed electronically